TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted] 41

SAMUEL FREEDMAN, PETITIONER,

vs.

W. S. ATKINS

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED [illegible]

CERTIORARI GRANTED APRIL 5, 1926

(30,150)

(30,150)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 300

SAMUEL FRESHMAN, PETITIONER,

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ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 4, 1924

[fol. 1] CAPTION—Omitted

[fol. 2] **IN UNITED STATES DISTRICT COURT**

PETITION OF BANKRUPT FOR DISCHARGE—Filed Feb. 18, 1923

To the honorable the judges of the District Court of the United States for the Northern District of Texas:

Samuel Freshman, bankrupt, of Dallas, County of Dallas and State of Texas, in said District, respectfully represents:

That on the 14th day of November, 1922, he was adjudged a bankrupt under the Act of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property and has fully complied with all the requirements of said Act, and of the orders of the Court pending this bankruptcy.

Wherefore, he prays that he may be decreed by the Court to have a full discharge from all debts provable against his estate under said Bankrupt Act, except such as are exempted by law from such discharge.

Dated this 3rd day of February, 1923.

(Signed) Samuel Freshman, Bankrupt.

[fol. 3] Jurat showing the foregoing was duly sworn to by Samuel Freshman; omitted in printing.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF OBJECTION TO DISCHARGE—Filed April 1, 1923

(Letterhead of W. S. Atkins)

"March 29, 1923.

"Mr. E. M. Baker, Referee in Bankruptcy, Prætorian Bldg., Dallas, Texas.

"DEAR SIR: I wish to enter a protest against the discharge of Samuel Freshman from bankruptcy, which is to come up on April 2, 1923.

"When Mr. Freshman was before the previous Referee in Bankruptcy he could not give a satisfactory reason for the vast number of notes and what became of the money derived from the notes and [fol. 4] why some or all of the money was not used to pay for cur-

rent and past bills, also why his stock of merchandise was so low as none of the many barrels supposed to have contained whiskey in his saloon had over several gallons of whiskey in any of them, also all of the whiskey that he had in the bonded warehouse was mortgaged to the limit to the banks, this rent unpaid for many months past amounting to about $2,200, also why he had deeded his property containing as I remember about 100 acres, to his wife just previous to the failure. This property was in Palo Pinto County. There were several other points that Mr. Freshman could not satisfactorily explain which I can not remember, but the whole failure was too much of a fraud and every appearance of a dishonest failure to get his discharge.

"I am protesting the discharge now for the above reasons and since then he has made no effort to pay any part to the creditors and now files a report showing no assets whatever.

Yours truly, (Signed) W. S. Atkins, Representing the Estate of George T. Atkins, Deceased."

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SPECIFICATIONS OF OBJECTION TO DISCHARGE—Filed April 10, 1923

George T. Atkins and W. S. Atkins of Dallas, Texas, creditors of the above named bankrupt, having provable claims allowed by the former Referee in said proceedings, do hereby oppose granting to [fol. 5] said Samuel Freshman of a discharge from his debts, and for the grounds of such opposition do file the following specifications:

(1) For the reason that with intent to conceal his true financial standing, he has destroyed the books of accounts or records from which such financial condition might be ascertained.

(2) That no accurate record of notes or disbursements of the proceeds were kept.

(3) That he built a building in his minor child's name, and admits that part of the money paid on building came from the business and part from the notes sold. His business at this time appeared to be in an insolvent condition.

(4) The method of buying a tract of land in Palo Pinto County and transferring same to his brother-in-law just prior to going into bankruptcy. If this act was not a fraudulent concealment of assets, it was a very irregular transaction.

Wherefore, objection is made to the granting of such application for discharge.

(Signed) W. S. Atkins, Objecting Creditor.

Jurat showing the foregoing was duly sworn to by W. S. Atkins omitted in Printing.

[fol. 6] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

EXCEPTIONS AND DEMURRERS OF BANKRUPT TO OBJECTION AND SPECIFICATIONS OF OBJECTION TO DISCHARGE—Filed April 27, 1923

To the honorable the Judges of said court and to Honorable E. M. Baker, referee in bankruptcy:

Samuel Freshman, bankrupt, having filed herein a petition for discharge, to which an objection was filed on April 1, 1923, and to which specifications were filed, towit, on April 10, 1923, by Messrs. Geo. T. Atkins and W. S. Atkins, on which specifications a hearing before the referee has been set for April 27, 1923, does now, before the said hearing, demur and except to the said specifications and each of them on the following grounds:

1. The specifications as a whole are insufficient and should be dismissed for the reason that it is not shown that those objecting are creditors who will be affected by the discharge and are interested in defeating it.

2. The first specification:

"For the reason that with intent to conceal his true financial condition he has destroyed books of account or records, from which such financial condition might be ascertained."

[fol. 7] is insufficient and should be dismissed for the reason that the averment that books "or" records were destroyed is in the alternative and is, therefore, uncertain, lacking in explicitness, and lacking sufficient certainty of detail.

3. The second specification:

"That no accurate record of notes or disbursements of the proceeds were kept."

is insufficient and should be dismissed for the reasons that:

(a) The specification is vague, uncertain and indefinite.

(b) It is not alleged that any failure to keep any record was with intent to conceal the financial condition of the bankrupt.

(c) It is not alleged that the record of notes or disbursements of the proceeds were not such that the financial condition of the bankrupt might have been ascertained therefrom.

(d) The allegation that the record of the notes "or" disbursements of proceeds was not accurately kept, is an alternative averment, which is, for that reason, lacking in explicitness.

[fol. 8] 4. The third specification:

"That he built a building in his minor child's name and admits that part of the money paid on building came from the business and part from the notes sold. His business at the time appeared to be in an insolvent condition."

is insufficient and should be dismissed for the reasons that:

(a) The specification is uncertain, indefinite and vague.

(b) The specification does not contain allegations of sufficient certainty of detail, there being no specific or clear reference to what building was built, when the same was built, in whose name the same was built, or where the money with which the same was paid for came from; what business is meant is not specifically stated; what notes were sold is not specifically stated; a greater particularity of averments is necessary; "specifications must be clear and unequivocable and contain specific averments of facts."

(c) It is not alleged that the bankrupt at the time referred to was insolvent, or that any business in which he was then engaged was in an insolvent condition.

(d) It is not alleged that the bankrupt transferred or removed or destroyed or concealed, or permitted to be removed or destroyed [fol. 9] or concealed, any of his property, either within the four months immediately preceding the filing of the petition, or theretofore. with intent to hinder or delay or defraud his creditors, or any of them.

5. The fourth specification:

"The method of buying a tract of land in Palo Pinto County, and transferring same to his brother-in-law just prior to going into bankruptcy. If this act was not fraudulent concealment of assets, it was a very irregular transaction."

is insufficient and should be dismissed for the reasons that:

(a) The specification is vague, uncertain and indefinite.

(b) The specification does not contain allegations of sufficient certainty of detail, what land is intended to be referred to being not stated, the method of buying or of transferring the same not being stated, the person to whom the same was transferred not being stated, the time when the same was bought and the time when the same was transferred not being stated; there being a fatal lack of particularity of allegations.

(c) The allegation that if the act was not a fraudulent concealment of assets, it was a very irregular transaction, is in the alternative, and is, therefore, uncertain and inexplicit.

[fol. 10] (d) The allegation that the act was an irregular transaction, if not a fraudulent concealment of assets, is too general and is a conclusion and not an allegation of fact.

(e) It is not alleged that the bankrupt transferred or removed or destroyed or concealed, or permitted to be removed or destroyed or concealed, any of his property, either within the four months immediately preceding the filing of the petition, or theretofore, with intent to hinder or delay or defraud his creditors, or any of them.

Wherefore, the bankrupt prays that the specifications as a whole, and each of them separately, be dismissed and that, in the absence of proper specifications of objections the referee recommend, and the District Court order, the discharge of the bankrupt as he has heretofore prayed.

Dated at Dallas, Texas, this April 27th, A. D. 1923.

(Signed) Samuel Freshman, Bankrupt. Etheridge, McCormick & Bromberg, Paul Carrington, His Attorneys of Record.

[File endorsement omitted.]

[fol. 11] IN UNITED STATES DISTRICT COURT

REPORT OF REFEREE IN BANKRUPTCY—Filed June 7, 1923

To the Honorable William H. Atwell, judge of said court:

Transcript of the proceedings relating to discharge in this matter is herewith submitted.

The discharge of the bankrupt is recommended for reasons fully set out in the attached papers based upon the proceedings and testimony, also fully set out.

Respectfully submitted, (Signed) E. M. Baker, Referee in Bankruptcy.

Dated at Dallas, Texas, this the 7th day of June, A. D. 1923.

RECORD OF PROCEEDINGS ATTACHED TO SAID CERTIFICATE

On this 27th day of April, A. D. 1923, came on to be heard the above styled matter, a petition for discharge having been duly filed by the bankrupt on February 8th, 1923, notices thereof having been

duly published and mailed by the referee to the respective creditors listed notifying each that any opposition to the discharge must be evidenced by an appearance in the office of the referee on or before [fol. 12] April 2nd, 1923, to that end, an objection to such discharge having been filed with the referee on, to-wit, April 1, 1923, by W. S. Atkins, representing estate of George T. Atkins, deceased, the said W. S. Atkins as objecting creditor having filed specifications of objection with the referee on April 10th, 1923, and no other person or creditor having appeared to oppose or having opposed, or having specified objection to, the discharge of the bankrupt, and notice of a hearing on this date on the issues raised by the said specifications of objection filed by W. S. Atkins having been duly served on all parties of interest.

Pursuant to such notice there appeared before the referee at 10:00 a. m. on this day the said W. S. Atkins, Samuel Freshman, the said bankrupt, and Paul Carrington of the firm of Etheridge, McCormick & Bromberg, representing the said bankrupt as attorney. Proceeding then to a hearing on the said specifications, the said bankrupt presented to the referee his demurrers and exceptions to the said specifications and the said objections, as therefore filed in the office of the referee, which said demurrers and exceptions were presented separately to the referee and considered and each overruled, to each of which actions by the referee the bankrupt excepted.

Thereupon the said specifications being presented to the referee for a hearing on the merits, and the bankrupt having been duly sworn to tell the truth, the whole truth and nothing but the truth, the referee asked Mr. Atkins what evidence, if any, he desired to proffer in support of his specifications. The reply of Mr. Atkins was that he desired to proffer in evidence the record of the bankrupt proceedings [fol. 13] numbered 1211 in bankruptcy on the docket of the district court of the United States for the Northern District of Texas, at Dallas, including the testimony introduced in evidence in those proceedings before the Honorable Eugene Marshall, Esq., Referee in Bankruptcy. To this proffer of evidence the bankrupt interposed the objections that such record including such testimony was irrelevant and immaterial to the issues raised by the specifications filed in these proceedings, and that no predicate had been laid for the introduction of such evidence, there having been made no showing that the witnesses who testified in the former proceedings were not now available for testifying before the referee in person and that for the purpose of these proceedings such evidence was secondary, hearsay, and inadmissible. These objections were sustained by the referee.

The referee then asked Mr. Atkins whether he had any other evidence to proffer at this time, Mr. Atkins' reply being in the negative. The referee then asked Mr. Atkins if he desired further time within which to procure witnesses and if he desired to employ attorneys and for them to have an opportunity to investigate the matter, to which inquiries Mr. Atkins responded in the negative, saying that he did not want to "send good money after bad."

The referee then on his own motion interrogated the bankrupt, first stating that he was unwilling to pass upon the question without

[fol. 14] any evidence before him, the testimony of the bankrupt in response to this examination by the referee being as follows:

Q. You are Samuel Freshman, the bankrupt who seeks a discharge in these proceedings?

A. I am.

Q. What books or records have you to show your financial condition?

A. I have none. All the books and records which I had at the time of the previous bankruptcy proceedings I delivered to Mr. Runge, trustee. Last time that I saw them or heard of them he had them. Mr. Runge, however, went away during the war and upon his return after the war the books and records could not be found. They have been misplaced or lost.

Q. You don't know of any destruction of the books?

A. I do not.

Q. Did you have an accurate record of your accounts?

A. I cannot say that it was accurate. The books and records turned over to Mr. Runge were identically of the same character, however, for the period of several years immediately preceding my first bankruptcy proceedings. I had at one time been both in wholesale and retail liquor business and kept very accurate books, having a book-keeper employed for the purpose during that time. When, however, several years before my first bankruptcy proceedings I got out of the wholesale end of the business, I discontinued the employment of a [fol. 15] book-keeper and my books from that time on were not completely accurate. Since discontinuing my business at the time of my adjudication in bankruptcy in 1915, I have been employed on a salary or on a commission basis and have not been engaged in any business either wholesale or retail merchandising, and since that date have had no occasion to keep books or records. Neither my salary nor my commissions during this time have been more than sufficient for my living. For no year have they been enough to require me to pay an income tax, just barely enough for a living.

Q. Did you build a brick building and place it in your minor child's name?

A. That building was put up with his mother's money and some of his own money from rents.

Q. What is the name of this child?

A. Benjamin Moses Freshman.

Q. Is he of age?

A. No.

Q. When did you build the building?

A. In the spring of 1914.

Q. What did it cost?

A. In the neighborhood of $18,000.00.

Q. Where is it located?

A. At the corner of Grand and Second Avenues, Dallas, Texas.

[fol. 16] Q. What is its size?

A. It is fifty feet by one hundred feet, two-story brick.

Q. How much did it rent for when you first built it?

A. It rented in the beginning for $200.00 and that became greater; the street car company was to bring the car in front of the building. It rents for $300.00 now.

Q. On whose land was it built?

A. I deeded the land to my wife in 1906, just before I married her.

Q. When did she die?

A. In 1910.

Q. Did you have any other children?

A. No.

Q. Did she leave a will?

A. No.

Q. Did the child inherit the land as her separate property.

A. Yes, and about six more cottages in her name.

Q. Does -he still own all that?

A. Yes.

Q. Did you also deed the cottages to your wife?

A. Yes, just before I married her.

Q. That was about 1906?

A. Yes.

[fol. 17] Q. When did you file your first petition in bankruptcy?

A. In the fall of 1915.

Q. How much of your own money did you put in this building?

A. I erected the building in the spring of 1914. I then sold some of my own property which is out near where the Terrell interurban is now running; I had put my money in my business and also had put some rents from the cottages and I put the money from the sale of this property into the brick building to equalize for the rents I had put in my business.

Q. How much of your own money did you put in this building?

A. I don't remember. I borrowed some money from the Dallas Mortgage Company in 1913 and I sold this property in 1914.

Q. You do not know how many thousands of dollars you put in the building.

A. No. It has been so long ago. I had dismissed it from my mind.

Q. What was the condition of the business when you placed this money in the brick building.

A. My business was then good. I was not losing money and what I placed in the brick building was not money that I would have put in my business.

[fol. 18] Q. What was it then that caused your failure in business?

A. There was an oil deal in which I lost a good deal of money.

Q. Is that the Palo Pinto County proposition?

A. Yes.

Q. How much did this transaction cost you?

A. Well I bought the ground at about $50.00 per acre.

Q. How many acres?

A. Two hundred.

Q. How did you pay for it? In cash?

A. No, I signed some notes and then I traded some property in South Texas in an effort to pay for the property but later I found I could not meet the notes and that I was going to lose it and my brother-in-law said he would take over the land for the assumption of the notes. There was no other way to dispose of the land that I knew of, for, at that time the oil scare was over and the land wasn't worth anywhere near $50.00 an acre. I do not think it was worth the amount of the notes my brother-in-law assumed. I know he has said that he would be glad to get his money back on the land and I know he would be glad to deed it to any creditor for the amount of the notes which he assumed.

Q. Is this the transaction referred to in the specifications in which it refers to the transfer of land to your brother-in-law before going into bankruptcy?

A. I suppose so.

[fol. 19] Q. Have any of your creditors listed in the first bankruptcy proceedings been paid in full or in part?

A. Mr. Runge, the trustee, had charge of the stock of my business and disposed of it. I do not know what disposition was made.

Q. Have you yourself paid any of the creditors there listed?

A. No.

Q. Have you promised to pay any of them?

A. No.

Q. Are there any creditors referred to in your present schedules that were not referred to in the schedules in your first bankrutcy?

A. Yes, there are several new creditors.

Q. Was it merely that they were omitted from the former proceeding or have they become creditors since that time.

A. They have become creditors since that time, at least those I now recall.

Q. Has your son's property ever been involved in litigation?

A. Yes sir, Mr. Runge as trustee, brought suit in an effort to prove that the property belonged to the creditors in the first bankruptcy proceeding. As I recall this suit was filed in one of the district courts of Dallas County, and was decided in my favor by the trial court and an appeal was taken to the Dallas Court of Civil Appeals by [fol. 20] Mr. Runge as trustee. At any rate, whichever party was the appellant in the court of civil appeals, that court decided in favor of my son and the case was not taken to the supreme court. Since that time there has been no possible doubt about my son's title. I had the guardianship proceedings instituted and myself appointed guardian of my son soon after my wife's death in 1910, and for all these many years have carefully superintended these properties as belonging to the guardianship estate of my son, under the supervision of the county court of Dallas County, Texas.

Q. You stated a little bit ago that the books which you turned over to Mr. Runge were of identically the same character as those which you had kept for many years. That is correct, is it not?

A. Yes, isr.

Q. What was the nature of these books?

A. Well you see since I abandoned my wholesale business, I did business strictly on a cash basis. The only books I kept were the stubs of my checks which showed all disbursements and the books showing merchandise received, containing entries made at the time of the receipt of the item of merchandise, showing the amount and value thereof. These stubs and books containing entries of merchandise received for many years were turned over to the trustee in the original case.

[fol. 21] Q. You have referred to the earlier bankruptcy proceedings. Did you file an application for a discharge there. If so what is the status of that application now?

To this question the bankrupt objected as irrelevant and immaterial to any of the issues presented on the specifications as filed in the present proceedings, there being neither objection or specification referring to or based upon such earlier proceedings, there being the further objection that the testimony elicited is secondary, not the best evidence, hearsay and inadmissible. Which objections being overruled by the referee, and the bankrupt having excepted to such order, the answer thereto was made as follows, subject to such objections and exception:

A. I filed the original petition in the fall of 1915, and was then adjudicated a bankrupt. In May, 1916, I filed my application for discharge, being represented by Messrs. Synnott and Penry. On August 25, 1916, Irish and Thornton as attorneys for the Citizen's State Bank & Trust Company and George Atkins filed notice of opposition to the application for discharge and on August 6, 1916, specifications were filed, the only specification being that with intent to conceal my true financial condition I had failed to keep books of account or records and destroyed books of account or records from which such financial condition might be ascertained. On February 1, 1917, the specifications came on to be heard before Hon. Eugene Marshall, Esq., Referee in Bankruptcy, to whom the same had been referred. No recommendation was made by the referee, but several years later Honorable E. M. Baker, having been appointed referee, [fol. 22] the papers in the case were found and based on them the present referee recommended that a discharge be refused. This recommendation was dated the 21st day of January, 1921. This recommendation made in the cause numbered 1211 in bankruptcy was forwarded to the district court with the record in those proceedings and in the district court Mr. J. H. Synnott, as attorney for the bankrupt filed exceptions to the referee's report and recommendation on June 7, 1922. The said exception, in addition to a reference to the merits of the record on which the recommendation was made challenges the sufficiency and conclusiveness of the record, on the grounds that the depositions were never signed nor sworn to by the witnesses and that the memorandum of the former referee was never signed nor filed by him, being the memorandum on which the present referee largely relied in determining his recommendation, the authority and jurisdiction of the present referee being also challenged on the ground that the matter had never been properly

referred to him by the court. Neither the recommendation nor the exceptions have been acted upon by the district court to this date.

The referee then indicated that his examination of the witness was at an end and again extended the opportunity to Mr. Atkins to examine the bankrupt or to proffer any other evidence on the issues raised by his specifications, whereupon, Mr. Atkins asked the bankrupt a single question:

[fol. 23] Q. Did you not admit in your previous testimony that you used part of your money from notes in building the brick building?

A. I don't remember.

Mr. Atkins not desiring to ask any other questions and not desiring to proffer any evidence, and the bankrupt not desiring to offer any evidence, the referee then took the foregoing testimony, together with the said objections and specifications, under consideration and after duly considering the same, announced in open court on the same day in the presence of Mr. Atkins and Mr. Freshman and his attorney, that the said objections and specifications were in his judgment not supported by the evidence and that therefore his recommendation to the court would be that the discharge prayed for by the bankrupt in these proceedings be granted.

Thereupon the referee dictated in open court, in the presence of Mr. Atkins, the bankrupt and his attorney, the following findings and recommendations:

Findings and Recommendations of the Referee

To the honorable judges of said court:

On this day came on for hearing the application of the bankrupt for a discharge and the objections and specifications filed by W. S. Atkins, the said instruments and the testimony taken to-day, together with the exceptions of the bankrupt to the objections and specifications being attached hereto.

[fol. 24] This case involves, it appears from the testimony here, the same bankrupt and all of the creditors who were involved in the proceedings heretofore filed in this court, being number 1211 in bankruptcy. There are, however, creditors in the present proceedings not involved in the former one. There was an opposition to the discharge in the former proceedings and a large mass of testimony was taken therein. As near as this referee could determine from such testimony and from the memorandum of his predecessor, before whom the same was taken in the previous case, the preceding referee intended to recommend that the discharge in that case should not be granted. Accordingly, this referee recommended to the court that the discharge be not granted as prayed for in the previous bankruptcy proceedings. It appears that this recommendation has never been acted upon and that the matter stands open for any action of a judge of this court.

This case was filed on November 11, 1922; the first meeting has been held, all creditors have been notified of the meeting and notices on the discharge have been sent to all creditors and no creditor has made any objection except the said W. S. Atkins. It appears that the father of W. S. Atkins, George T. Atkins, deceased, was a creditor listed in the previous proceeding and the objection is made but W. S. Atkins does not have sufficient interest as a creditor to make this present opposition. The referee has ruled, however, that such interest does exist, Mr. Atkins having testified that the will of his deceased father has been probated in Dallas County, Texas, making [fol. 25] him a party interested and having testified that it was his money, that of W. S. Atkins, that was loaned to the bankrupt by his father. This exception, as all others made by the bankrupt, to the objections and specifications, is overruled.

The first specification of objection, the referee believes, has not been sustained by any testimony in the present record. It is not shown that he has even had a business that books of account were necessary. The bankrupt conducted a retail liquor business, doing a cash business for several years prior to his previous bankruptcy. The books which he kept showing merchandise received and the stubs of his checks showing disbursements were turned over to the trustee in the original case. Since the fall of 1915 the bankrupt has been a traveling salesman on a salary or on a commission basis, his returns being less than the amount which would make it necesary to pay an income tax, the returns being barely enough for his own personal living expenses.

It is not shown that the bankrupt has ever destroyed books of account or records of any character or has ever attempted to conceal his true financial standing; the uncontradicted testimony is that all books and records were turned over by him to the trustee in the previous bankruptcy case.

The first and second specifications are, therefore, overruled.

The third specification is overruled. The testimony is uncon- [fol. 26] tradicted that the property had belonged, since 1906, to the bankrupt's wife as her separate property, on which the brick building was constructed, and that the land and the building, after its completion was a part of the guardianship estate of the minor son of the bankrupt after the death of the bankrupt's wife. If, however, the creditors were entitled to any equity in the property, the question would be a proper one for determination in the civil courts and would not be the proper basis for the denial of a discharge. The question has ben raised in the state courts by the trustee in the former bankruptcy proceedings and the case brought by the trustee was finally lost, it having been held by the Dallas Court of Civil Appeals that the property was owned entirely by the minor son.

Even if it were a fact that the bankrupt used much of his own money to build improvements on the land of his son, the referee does not believe that such action could prevent his discharge because it was not such a concealment of assets as would prevent a discharge. He had a legal right to do this and therefore the action,

even though it was morally wrong, could not prevent his discharge. Thus we have frequent cases where the bankrupt sells goods which have not been paid for and places the proceeds in exempt property. The money received for the goods morally belongs to the creditors but under the law the bankrupt retains the property and certainly, although he admits in open court that his action defrauded his creditors, morally speaking, the action would not prevent his discharge in bankruptcy because he had a legal right to do that which [fol. 27] he had done. The court cannot consider any code of morals except those which are prescribed by the law. In fact, the court must assume in administering the law that there is no other code of morals, if such alleged code contravenes the law.

The fourth specification is also overruled for the reason that it is not supported by the testimony and for the added reason that it is so indefinite that a discharge cannot be refused thereupon. If any condition did in fact exist, with reference to this Palo Pinto County land, which would have entitled the creditors to any rights in it, the trustee could have recovered this property in the earlier proceedings; the testimony shows that the property is still in the hands of the brother-in-law and the same might be recovered for the benefit of the creditors involved in the present proceedings if they have in equity any rights thereto. This, again, is a matter for the civil courts. The testimony in this record that the brother-in-law took the land in consideration of assuming notes of the bankrupt which were at least equivalent to the value of the land, is uncontradicted, and indicates that the transaction was not an irregular one.

For the reasons above stated, I am obliged to recommend that the objections and specifications to the discharge be overruled and that the discharge prayed for in these proceedings be granted.

In view of my recommendation in the earlier proceedings, above referred to, I have been loath to so recommend. As a matter of law, however, I have considered that my duty is plain to ignore, in view of [fol. 28] the objections and specifications filed herein, the status of the earlier proceedings, and to pass upon the present issues solely on the basis of the testimony properly introduced, on this hearing.

The decisions clearly are that a definite refusal of a discharge in one bankruptcy proceeding may be pleaded and proved as res-judicata to preclude a discharge in a second bankruptcy proceeding, as to the debts provable in the first proceeding; it is definitely established also that a creditor must state as a part of his pleadings in specifying his objections to a discharge in the second proceedings the prior refusal of a discharge, and must, on a hearing, prove such refusal by admissable evidence and that on the failure of any creditor so to do, it is the duty of the court in the second proceedings to grant a discharge as prayed for. A leading case to this effect is that of Bluthenthal vs. Jones, 208 U. S. 64, in which the United States Supreme Court unanimously so held in 1908; quoting from the opinion of Mr. Justice Moody:

"Undoubtedly, as in all other judicial proceedings, an adjudication refusing the discharge in bankruptcy, finally determines for all time

and in all courts, as between those parties or privies to it, the facts upon which the refusal is based. But courts are not bound to search the records of other courts and give effect to their judgment. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced. Plaintiffs in error failed to do this. When an application [fol. 29] was made by the bankrupt in the District Court for the Southern District of Florida, the judge of that court was, by the terms of the statute, bound to grant it unless upon investigation it appeared that the bankrupt had committed one of the six offenses as specified in section fourteen of the Bankruptcy Act as amended. An objecting creditor might have proved upon that application that the bankrupt had committed one of the acts which barred his discharge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved, it would have taken the place of other evidence and have been final upon the parties to it. But nothing of this kind took place. Bluthenthal and Bickart intentionally remained away from the court and allowed the discharge to be granted without objection. Since the debt due to the plaintiffs in error was a debt provable in the proceedings before the District Court of Florida and was not one of the debts exempted by the statute from the operation of the discharge, it was barred by that discharge."

The line of authorities to the same effect as this decision has recently been emphasized to my mind because the question was presented in the case numbered 1407 in bankruptcy in this court, the matter of Harry Schwartzberg, bankrupt, which was referred to me [fol. 30] as referee. In that case a discharge was applied for by the bankrupt and no objection or specification of objection thereto was filed by any creditor. It appeared during the hearings, however, that the bankrupt had been refused his discharge in an earlier bankruptcy proceeding involving the same debts as were scheduled in the one then pending before me. On my own motion, therefore, that is to say without the filing of objection or specification of objection, I recommended to this court that the discharge be refused in the second proceeding for the reason that the question had been determined in the earlier one. This recommendation, however, was not followed, an opinion being rendered on January 31st, 1921, by the Honorable E. R. Meek, Judge of this court, to the effect that in the absence of objection or specification of objection in the second proceeding, it was the duty of the court to grant a discharge therein.

This is identically the proposition here presented. There is no objection or specification of objection relating to the previous bankruptcy proceeding of the present bankruptcy, nor is there any proper showing in the present record of the pendency or status of such earlier proceeding. Indeed, it occurs to me that, were there appropriate pleading and proof of the status of the earlier proceedings,

showing my recommendation therein and that the same has never been passed upon by the District Court, my duty would be nevertheless to recommend a discharge in the present proceeding, for a res-judicata could not be shown by the mere recommendation in the [fol. 31] former proceeding or other than by proof of the entry of a final order denying a discharge in the earlier proceeding. See In re Elkind, C. C. A. 2nd C., 175 Fed. 64.

Dated at my office in Dallas, Texas, as of April 27th, 1923.

(Signed) E. M. Baker, Referee in Bankruptcy.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER GRANTING DISCHARGE IN PART AND DENYING DISCHARGE IN PART—Filed June 9, 1923

Whereas, application has been made by Samuel Freshman, the bankrupt, for a discharge herein, and a specification of objections has been filed to a discharge by W. S. Atkins and such specification has been referred to E. M. Baker, Esq., as special master, to ascertain and report the facts with his opinion, and such special master has reported and recommended that such specification be overruled and that the discharge applied for be granted;

Whereas, the record, including the findings and recommendations of said special master, has been duly presented to this court, Messrs. Etheridge, McCormick & Bromberg and Paul Carrington having appeared in support thereof, on behalf of the bankrupt, and there having been no appearance in opposition;

Whereas, following such presentation the court has duly considered such record and has concluded for the reasons presented in a [fol. 32] written opinion filed herewith, that the discharge should be granted in part and denied in part,

It is ordered that the application of the bankrupt for a discharge herein is denied insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in Bankruptcy, on the docket of this court, in which proceedings the bankrupt herein was adjudicated a bankrupt, but that as to creditors listed in the petition filed in these proceedings who were not listed in the earlier proceedings aforesaid, the discharge prayed for is granted, to which action of the court the bankrupt, by attorney, excepted.

(Signed) Wm. H. Atwell, District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

OPINION—Filed June 9, 1923

In cause number 1211, bankruptcy, the same bankrupt filed a voluntary proceeding. In due time he applied for his discharge. His discharge was contested. Considerable testimony was taken upon this issue but before a recommendation was made by the referee to the district judge, the referee died, and the proceedings passed to his successor who, after having reviewed the record, concluded that it should be recommended that the discharge be not granted. Ac- [fol. 33] cordingly the referee recommended to the court. This recommendation was never acted upon and it is still open for action by the court.

Those proceedings were instituted some time in 1914 or 1915.

On November 11th, 1922, the present case, number 1814, voluntary, was filed by the bankrupt. All of the creditors included in the first application are likewise creditors in this application. There are also some other creditors. A contest was filed to the application for discharge which was seasonably filed by the bankrupt in the instant case. The referee, in passing upon such contest, overruled the exceptions and demurrers to its sufficiency and heard testimony. Such testimony being almost entirely that of the bankrupt. After such hearing referee concluded that he could not legally deny a recommendation that the discharge be granted and cited, Bluthenthal vs. Jones, 208 U. S. 64; and, in re Elkind, 175 Fed. 64, as authorizing and supporting his action.

This court judicially knows, even though it has no actual knowledge, that this same bankrupt has an application pending in this court for discharge, from practically the same debts and creditors that are scheduled in the present proceeding, and that, however, such discharge was recommended against by the referee, he has not pressed a hearing on such application but has allowed the years to run by and is now seeking through another proceeding the same thing that he was compelled to seek in the first proceeding, if he should have relief.

[fol. 34] The evidence submitted to the referee in the first proceeding satisfied that officer that the bankrupt had been guilty of such infractions as rendered it unjust to allow him to have the benefit of the relief afforded by this act of Congress. Because there was no formal denial of the discharge by the district court it is contended that there could be no res adjudicata.

The phrase, res adjudicata, as ordinarily understood and defined by the courts means an adjudication; a former judgment; a definite hearing and determination.

This does not seem to be the significance that the bankrupt courts have been giving to the phrase. Circuit Judge Sanborn, speaking for the Circuit Court of Appeals for the eighth circuit in Kuntz vs. Young, 131 Fed. 719, held that when the bankrupt failed to apply for his discharge within the 12 months prescribed by the law that his failure to do so charged him with a judgment against him which

was res adjudicata and would prevent his discharge from the same debts in a subsequent proceeding.

The distinguished jurist said:

"The failure of the bankrupt to apply for a discharge from his debts in the involuntary proceeding within 12 months after the adjudication foreclosed his right to such a discharge. It is only within that time that he may, under the bankruptcy law, make a lawful application to be relieved from his debts. The record of his [fol. 35] failure to make the application in that proceeding was, in effect, a judgment by default in favor of his creditors to the effect that he was not entitled to a discharge from their claims. A judgment by default renders the issue as conclusively res adjudicata as a judgment upon a trial. The result is that the question whether or not the bankrupt was entitled to be discharged from the claims of the creditors scheduled and provable in the involuntary proceeding was conclusively determined in an action between them and the bankrupt by the record of his failure to apply for a discharge in that proceeding. But the parties to the voluntary were the same as to the involuntary proceeding, for Kuntz scheduled the same claims and creditors, and the trustee who objected to his discharge was the legal representative of the latter. The bankrupt's application for a discharge in the voluntary proceeding presented the same issue which had been conclusively determined against him in the involuntary proceeding, and there was no error in the refusal of the court below to reverse the former judgment and grant the application."

This case was followed by District Judge Lanning in 133 Fed. 1,000, in re Weintraub.

Circuit Judge Ward, speaking for the court of appeals for the second circuit In re Elkind, 175 Fed. 64, held, in substance, that the statute meant what it said, when it referred to the application for [fol. 36] discharge within the year and that such application having been made, and dismissed for a technical error, was sufficient to authorize the making of a subsequent application, even though such subsequent application was more than 12 months after adjudication. In the course of the opinion he says:

"An examination of the record in the earlier proceedings shows that no order was ever entered upon the memorandum of the district judge, so that the question is not res adjudicata."

This expression would seem to be dictum.

In the present case the bankrupt has seen fit to ignore his first proceeding. Perhaps he was convinced that a pursuit thereof would result in an order denying his discharge. At any rate he has permitted the case to go unhastened and after the lapse of seven or

eight years seeks, by another proceeding, to do what he failed to accomplish in the first proceeding.

In re Cooper 236 Fed. 298;
In re Kuffler, 153 Fed. 667, affirmed, 168 Fed. 1021;
In re Silverman, 157 Fed. 675;
In re Elvy, 157 Fed. 935;
In re Pullian, 171 Fed. 595;
In re Van Vorries, 168 Fed. 718.

I am unable to note any substantial difference between a failure to apply for a discharge within 12 months and a failure to prosecute [fol. 37] an application for a discharge after a referee shall have recommended against such a discharge. Of course, I, of course see the technical difference. But, there is no real difference. And while the right to a discharge is a valuable right, and while this right was the real purpose, doubtless that Congress had in mind, when it passed the bankrupt statute, still we may not disregard the fundamentals of equity jurisdiction and allow an applicant to feel out the temperament of the court, through its officers, and then abandon his pleadings and when time has changed the *personal* of referee and judge, re-enter the tribunal and seek the same relief that he could not get at a former time.

In re Stone, 172 Fed. 947.

As to the new creditors; that is, as to the creditors in the present petition who were not creditors in the first petition, there appears to be no just reason why he should not be discharged therefrom, but as to the creditors who were creditors in the first petition his application for a discharge is denied and an order will be drawn in accordance with this view.

Since dictating this opinion I have inspected the record in number 1211, the original bankruptcy, and have signed an order denying the discharge in that case.

(Signed) Wm. H. Atwell.

[File endorsement omitted.]

[fol. 38] IN UNITED STATES DISTRICT COURT

MOTION OF SAMUEL FRESHMAN, BANKRUPT, THAT ORDER GRANTING DISCHARGE IN PART AND DENYING DISCHARGE IN PART, ENTERED JUNE 9TH, 1923, BE RECONSIDERED AND VACATED, FOR A REHEARING AND ON SUCH REHEARING FOR ENTRY OF AN ORDER GRANTING DISCHARGE AS PRAYED FOR—Filed June 16, 1923

To Honorable William H. Atwell, judge of said court:

Now comes Samuel Freshman, bankrupt, and moves the court that its order of June 9th, 1923, granting a discharge in part and denying a discharge in part, be reconsidered and vacated, and that a

rehearing on the question of discharge be granted, and that upon such rehearing the court enter an order granting a discharge to the bankrupt as prayed for. As grounds for the said motion, the bankrupt represents:

1. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because the specifications of objection filed by the objecting creditor were and are fatally defective and insufficient to raise any issue for determination by the court, the bankrupt therefore being entitled of right to his discharge as prayed for.

2. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because the specifications of objection filed by the objecting creditor were and are wholly unsupported by any evidence.

[fol. 39] 3. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because the specifications of objection filed by the objecting creditor were abandoned and waived, as shown by the record of the proceedings had before the special master, by the absence of exception and objection to the findings and recommendations of the special master and by the absence of appearance in this court of the objecting creditor, and of any attorney on his behalf.

4. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because no objection or specification of objection was filed in this cause by or on behalf of any creditor, on the ground that, or averring that, the status of such former proceeding numbered 1211 precluded or in any way affected the granting of a discharge herein as prayed for.

5. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because there is no showing in this record that there has ever been a final determination in the earlier proceeding numbered 1211 that the bankrupt is entitled or is not entitled to a discharge for any ground properly placed in issue in this cause, that is to say, such a final determination as may preclude or in any way affect the granting of a discharge herein as prayed for.

[fol. 40] 6. For the reasons above presented, we submit that the court erred in considering in any way as applicable to the issue presented in the record before it in this cause, the status of the earlier proceeding numbered 1211. Since, however, the court has in part denied a discharge based upon judicial knowledge of such earlier proceedings, without objection or specification of objection on

that ground and without evidence in the record to such effect, and since the references in the opinion of the court filed with its said order herein refers to such earlier proceeding, as we conceive, erroneously in some particulars, we submit to the court, to correct what we conceive to be a misapprehension of the status of the earlier proceeding, the following facts for the purpose of showing that in addition to the errors above presented, the court erred in considering the status of the earlier proceeding a ground for denying a discharge in part herein.

A. In the earlier proceeding the voluntary petition was filed in November, 1915. The application for discharge was filed in May, 1916. Objection and specification of objection on behalf of the Citizens State Bank & Trust Company and George T. Atkins were filed in August, 1916. The foregoing was referred to Hon. Eugene Marshall, then referee, as Special Master who heard evidence on the same, consisting solely of the testimony of the bankrupt and of the trustee in bankruptcy, but who never reached a final conclusion with reference to the same and never made findings or recommendations or filed the same with the court.

[fol. 41] B. More than a year after the conclusion of such hearings, the said Hon. Eugene Marshall died and was succeeded as referee by Hon. E. M. Baker. This matter was never referred to the new referee formally as a special master. The new referee had no hearings on the matter and no witnesses testifying before him. For about two years after the appointment of the new referee, the record in the matter appeared to have been lost and no action was taken. In January, 1921, the record was found including an unsigned and unauthenticated memorandum purported to have been dictated by the former referee which tended to show that the former referee intended to recommend that a discharge be denied. Based solely upon a reading of this memorandum and a reading of the stenographic notes of the testimony taken before the former referee, Hon. E. M. Baker recommended that the discharge be denied on January 28th, 1921.

C. The bankrupt and his attorney, Mr. J. H. Synnott, had in every way possible sought to hasten the final determination of the question by the former referee and repeatedly made inquiries of the new referee concerning the status of the matter; they were finally told that because of the inability to find the former records, the new referee expected to recommend that a discharge be granted, from which advice they thought the matter closed unless and until they received [fol. 42] further notice. In June, 1922, immediately upon learning of the recommendation of the Hon. E. M. Baker, the bankrupt filed exceptions and objections thereto and moved that a discharge be granted or, in the alternative, that the matter be again referred to a special master. No further action having been taken until the court, on its own motion on June 9th, 1923, considered the record and ordered that the discharge be denied without notice to the bankrupt or his attorneys, they immediately upon learning of such action,

have excepted thereto and have renewed their said objections and exceptions and said motion as grounds for a rehearing of the matter by the court. Neither the bankrupt, nor any one for him, has delayed or attempted to delay a determination of the matter.

D. Long before June 9th, 1923, the objection and the specification of objection filed in August, 1916, were abandoned and waived. Insofar as the bankrupt knows, no affirmative action by or on behalf of the Citizens State Bank & Trust Company and George T. Atkins, or either of them, or their attorneys, has been taken in such proceeding since the hearing of the contest before the Hon. Eugene Marshall on February 1st, 1917, and on information and belief, the bankrupt avers that no affirnative action by or on behalf of them or any of them, has been taken since that date. The said creditors are not now existent and have not existed for a long time, the said [fol. 43] George T. Atkins having been long since dead and the Citizens State Bank & Trust Company, which was a banking corporation of Dallas, Texas, having long since discontinued business and been dissolved; the firm of attorneys representing such creditors has long since been dissolved.

7. Affidavits in support hereof are attached hereto.

Respectfully submitted, (Signed) Etheridge, McCormick & Bromberg, Paul Carrington, Attorneys for Samuel Freshman, Bankrupt.

[File endorsement omitted.]

AFFIDAVIT OF J. H. SYNNOTT ATTACHED TO SUCH MOTION

STATE OF TEXAS,
County of Dallas:

Before me, the subscribed authority, on this day personally appeared J. H. Synnott, to me well known, who, being first duly sworn, on his oath says:

In November, 1915, I filed as the attorney for Samuel Freshman his voluntary petition in bankruptcy in the District Court of the United States for the Northern District of Texas at Dallas; and on May 12, 1916, I filed for him, he having been adjudicated a bankrupt meanwhile, his application for discharge. Notice of opposition to the application having been filed on August 25, 1916, by Irish & Thornton as attorneys for the Citizens State Bank & Trust Com- [fol. 44] pany and George T. Atkins and specifications thereon filed on the 26th day of August, 1916, on their behalf, a hearing on such instruments, they having been referred to the Honorable Eugene Marshall, Esquire, came on to be heard before such special master on February 1, 1917. Testimony of the bankrupt and Julian Runge, trustee, was introduced on behalf of the objecting

creditors, but the books of the bankrupt which had been delivered to and were then in the custody of the trustee were not introduced in evidence.

Several times during the next year I called upon the Honorable Eugene Marshall urging that he perfect his record on the issues presented by such instruments and by such testimony, but the said master seemed undecided. On or about February 1, 1917, the said master had dictated a memorandum in which he expressed a conclusion that the discharge should be denied; the memorandum, however, was not signed by the master and in conversation with me, the master promised that he would advise me when he was ready to make up his record. The master agreed that when he finally made up his findings and conclusions he would call the attorneys for the creditors and me before him and allow all to be heard as to the form of his report and would consider their exceptions and would give all a chance to file formal exceptions to the report. In the month of ——, 1918, the said Eugene Marshall died, he not having, theretofore, called the lawyers before him as he had agreed to do. Insofar as I know the master had never taken any further action or cognizance of the case.

[fol. 45] The Honorable E. M. Baker being appointed Referee in Bankruptcy to succeed the deceased Honorable Eugene Marshall, I soon called at the office of the new Referee and asked for information concerning the status of this matter. At that time the record of the proceedings had before the former Referee could not be found. On one or more other occasions I conferred with the new Referee and on each of these occasions it was reported that the record in the case had been lost.

From the date of the instrument signed by Honorable E. M. Baker, the new Referee, January 28, 1921, it appears that the record, including the memorandum dictated on February 1, 1917, under the circumstances above stated, must have been then found. I was given no notice of the finding of the record, nor was I given any notice of the signing of the said instrument by the Honorable E. M. Baker on January 28, 1921, nor was I given any notice of the filing thereof, together with the return of the papers above described and the record of the testimony taken, in the office of the District Clerk immediately thereafter; Mr. Freshman, my client, was not given notice of any of these things. I did not learn nor did my client for more than a year thereafter that the record had been found nor that any recommendation or purported recommendation had been made. As soon as I discovered this I filed the objections and exceptions and motion containing the instrument filed by me with the District Clerk on June 7, 1922.

[fol. 46] Long before January 28, 1921, the firm of Irish & Thornton had been dissolved and Mr. Thornton, who had been looking after this matter for the objecting creditors, had been elected and served a term as Judge of the County Court of Dallas County at Law No. 2. In so far as I know neither Mr. Thornton nor Mr. Irish, nor the creditors for whom they were acting nor any of them,

took any affirmative action in these proceedings since the first day of February, 1917; and on information and belief I state that they took no such action. Long prior to January 28, 1921, the Citizens State Bank & Trust Company had dissolved, and George T. Atkins, the other objecting creditor, I understand, had died.

I have at no time taken any action in these proceedings on behalf of Mr. Freshman, nor has he taken any action for the purpose of or which tended to postpone or delay a consideration of these proceedings. I hastened in every way that I could a hearing before the Honorable Eugene Marshall and urged him repeatedly to reach his final conclusions and to file a final recommendation and report.

Upon the succession of the Honorable E. M. Baker as Referee, I made inquiries concerning the matter as aforesaid, and on the last occasion of making such inquiries was advised that in the absence of the record of the proceedings had before the Honorable Eugene Marshall, the Honorable E. M. Baker intended and expected to recommend to the court that the discharge be granted. After receiving such advice I assumed that in due course a recommendation that the [fol. 47] discharge be granted would be filed with the court and in due course presented. I was surprised to learn in June, 1922, that a contrary recommendation had been made.

The exceptions and motion which I filed on June 7, 1922, presented as forcifully as could the objections which I made to the entry of an order denying a discharge. An order denying a discharge having been entered on June 9, 1923, without my having had an opportunity to present such objections to the court or to except to the action of the court, I have renewed all of said objections as well as having made others by a motion that the court re-open and hear the question of discharge, etc., filed on June 15, 1923, a true copy of which is hereto attached, which is still pending in said cause and on which I am insisting, which said motion incorporates bodily the motion and exceptions which I filed on June 7, 1922.

(Signed) J. H. Synnott.

Sworn to and subscribed before me on this 15th day of June, A. D. 1923. (Signed) J. E. Synnott, Notary Public in and for Dallas County, Texas. (Seal.)

Copy of Motion Filed in Cause Styled "In the Matter of Samuel Freshman, Bankrupt, No. 1211, in Bankruptcy," as Attached to the Foregoing Affidavit of J. H. Synnott

To the honorable the judges of said court:

[fol. 48] Samuel Freshman, bankrupt in the above numbered and entitled cause, by his attorney of record, excepts to the order of the Court entered herein on June 9, 1923, denying a discharge and moves the Court to reopen and rehear the question of discharge, and in so doing that it enter an order granting the bankrupt his discharge,

or, in the alternative, that the application for discharge with objections and specifications of objection thereto, be referred to a Special Master for determination, and as grounds for the said motion shows the Court:

I

Despite the exceptions of the bankrupt and his motion filed herein on June 7, 1922, which had never been acted upon, the court of its own motion and without notice to the bankrupt or his attorney of record took under consideration on June 9, 1923, the purported recommendation of Honorable E. M. Baker, Referee in Bankruptcy, dated January 28, 1921, that the application of the bankrupt for a discharge herein be denied, and on that date entered an order denying such discharge without affording the bankrupt or his attorney an opportunity to present either the exceptions of the bankrupt or his motion referred to, or to present argument or to except to the action of the court. This action of the court having accidently come to the attention of the attorney of record for the bankrupt on June 13, 1923, the said attorney has immediately prepared and filed this instrument and hereby as promptly as possible takes exception to such action of the court.

[fol. 49] II

The bankrupt by his attorney of record renews the exceptions made to the purported report of the Honorable E. M. Baker, above referred to, made in the said instrument filed June 7, 1922, a copy of which is attached hereto as Exhibit "A" and made a part hereof as completely as if set out in full, and excepts to the action of the court referred to for the reasons that exceptions were taken to the said purported action of the Honorable E. M. Baker.

III

The bankrupt by his attorney of record, renews the motion that the discharge herein applied for be granted, or, in the alternative, that the application for discharge be referred to a Special Master for the taking of testimony and filing of a report as required by law, contained in the instrument filed June 7, 1922, which said instrument is attached hereto as Exhibit "A" and incorporated as completely as if set out in full, and presents here as reasons for a rehearing and a determination in favor of the bankrupt on such rehearing, the reasons set forth in such instrument.

IV

The bankrupt avers and represents that before June 9, 1923, the objections filed to his discharge on August 25, 1916, by Irish & Thornton, as attorneys for the Citizens State Bank & Trust Company [fol. 50] and George T. Atkins, and the specifications of objection filed by said attorneys on behalf of said creditors on August 26, 1916,

were long since abandoned and waived. In so far as the bankrupt knows no affirmative action by or on behalf of the said creditors or these attorneys has been taken in these proceedings since the hearing of the contest thereon before the Honorable Eugene Marshall, Esquire, on February 1, 1917, and on information and belief, the bankrupt avers that no affirmative action by order on behalf of them or any of them, has been taken since that date. The said creditors are not now existent, the said George T. Atkins having long since been dead, and the Citizens State Bank & Trust Company, which was a banking corporation of Dallas, Texas, having long since discontinued business and dissolved; the firm of attorneys representing such creditors has long since dissolved. No affirmative action having been taken by or on behalf of such creditors or on behalf of any other creditor to hasten a determination of this contest to a discharge, and no final determination having as a result been made for a period of more than six years, the objections to the discharge as prayed for herein and the specifications of objection were abandoned and waived, and the court erred, for that reason, in denying a discharge herein.

Respectfully submitted, (Signed) J. H. Synnott, Attorney of Record for Samuel Freshman, Bankrupt.

[fol. 51] Exhibit A Attached to Said Motion, Being Copy of Instrument—Filed June 7, 1922

Now comes Samuel Freshman, the bankrupt in the above entitled and numbered cause and excepts to the report of Honorable E. M. Baker, and the recommendation filed by the Honorable E. M. Baker, herein, recommending the refusal of the discharge of the bankrupt, and moves the court either to ignore the same and grant the discharge herein applied for, or refer this application for discharge again for taking testimony and filing a report as required by law, for the reason that the same was never referred to the Honorable E. M. Baker, and because the referee who heard the evidence, never filed any report or recommendation or findings of facts as required by law.

History of Proceedings

On the 12th day of May, 1916, the bankrupt filed herein in due form of law, his application for discharge. On the 25th day of August, 1916, Irish and Thornton, as attorneys for the Citizens State Bank and Trust Co., and Geo. T. Atkins, filed notice of opposition to the application for discharge. On the 6th day of August, 1916, specifications of objection were filed by Geo. T. Atkins and M. E. Martin, Vice President of the Citizens State Bank and Trust Co. The only specification was as follows: For the reason that with intent to conceal his true financial condition, he has failed to keep books of account or records, and has destroyed books

[fol. 52] of accounts or records, from which such financial condition might be ascertained. About the 1st of February, 1917, this application for discharge, together with specifications of objections, came on to be heard before the Honorable Eugene Marshall, Esq., Referee in Bankruptcy, to whom the same had been referred. At such hearing, Julius Runge, Trustee, was called as a witness, but his depositions were never reduced to writing and signed or sworn to by him. The bankrupt, Samuel Freshman was examined and his depositions were sworn to before the Referee on the 12th of February, 1916. Apparently at the conclusion of the hearing, the Referee dictated his opinion as to the merits of the application for discharge. He also stated in that dictation that he admitted in evidence, the depositions taken at the first meeting of the creditors. This indorsed Referee's memorandum was never signed by him or filed by him, and can have no place in this record whatever. As a matter of fact, at the conclusion of this hearing, and several times thereafter, in conference with the attorney for the bankrupt, he stated that when he went to make up his findings and conclusions, he would call the lawyers before him, including the attorney for the bankrupt, and allow them to be heard as to the form of report, and consider their exceptions and give them a chance to file exceptions to his report. The lamented Referee lived several years thereafter, or at least quite a while thereafter and never took any further action in or cognizance of the case. Years later, the Honorable E. M. Baker was appointed Referee in the place of the Honorable Eugene Marshall, deceased, and conferred with the bankrupt's attorney a number of times, al-[fol. 53] ways reporting that the record in the case had been lost. It appears that about the 28th day of January, 1921, the Honorable E. M. Baker found the papers in the case, that is found the supposed testimony taken on the hearing of the application for discharge, and the testimony taken at the first meeting of the creditors, and an unsigned memorandum of the Honorable Eugene Marshall, Referee as hereinbefore referred to. I presume that this record was then transmitted to the clerk, at least, on the 28th day of January, 1921, the Honorable E. M. Baker entered an order recommending that the discharge be not granted. The attorney for the bankrupt did not learn for a year thereafter that the record had been found or that any recommendation had actually been made.

Authorities

Collier on Bankruptcy, page 361: The Referee being denied jurisdiction to determine discharges, reference to him, not as Referee, but as Special Master in Chancery to hear and report on the facts was quite universal. From In re Randall, 159 Fed. Rep. 298, and International Harvester Co. v. Carlson, 217 Fed. Rep. 736, we gather ample authority that a Referee as such has no jurisdiction over a contest. In re Murray, 160 Fed. Rep. 983, it is held that the Special Master should not base a finding upon the original examination of the bankrupt before him as Referee. From Collier on Bankruptcy, page 365, I quote the following: At the conclusion of the reference,

the Special Master makes up a report and files it with his record and [fol. 54] all papers and pleadings with the clerk. Such report should embody a summary of his findings and state his opinion thereon. He should present his own judgments on the facts.

Remarks

The Honorable E. M. Baker, as Referee in Bankruptcy, had no jurisdiction whatever to render any services in the matter, unless the matter had been specially referred to him as Special Master. This court has no right to consider anything which occurred before the Honorable Eugene Marshall, as Special Master, until he filed herewith a report of his findings duly executed by him, together with the evidence upon which he based the same. Now the Honorable E. M. Baker, concludes because he found somewhere in the office of the Honorable Referee, a typewritten statement not signed by the Honorable Referee and not filed, that he can gather therefrom what the Honorable Referee intended to recommend, but failed to do so. I presume the theory upon which the Honorable E. M. Baker acted, was, that it could be shown that the undersigned statement was dictated by the Referee, the Honorable Eugene Marshall. That is probably correct, and in fact, we do not deny. That at the conclusion of the hearing, the Honorable Eugene Marshall delivered himself of an opinion about as the one found in the record, but the Honorable Master in Chancery had a right to change his mind. The fact that he held the record before him month after month, year after year, and never legally made any recommendations, and [fol. 55] the fact that he conferred with counsel time after time, and agreed to give counsel a hearing, when he finally went to make up his record, are proof positive that his mind was never fully made upon the record. There has therefore, never been, any report of the Master made in this case. Again, even if the undersigned paper had been signed by the Referee, that is by the Honorable Eugene Marshall, the record would still be insufficient. Before his acts were complete, he had to actually file the record with this court. He never did so. He never even had the witnesses swear to their testimony. He did not die suddenly so as to prevent it, but he retained the matter in his hands month after month as an indication that his mind was not made up. Again the record as it is found, even though all the papers had been signed, do not constitute such a report of the Special Master as would give the court jurisdiction to pass upon the application. It does not include any findings of fact or conclusions of law such as objections can be filed to. It consists mostly of testimony taken at the first meeting of the creditors, which constitutes no part of the record.

Wherefore the bankrupt prays the court either to refer this application for discharge to another Master in Chancery to proceed upon as originally, or disregard the same and grant the application for discharge as prayed for.

[fol. 56] II

And now comes the bankrupt and objects to the report of the Special Master in Chancery herein, recommending that his application for discharge be refused, for the reason that there is no sufficient evidence upon which to base the same, and because the evidence, taken all together, does not prove even by preponderance of the evidence or establish either of the objections or specifications of objection filed by the objecting creditors.

Statement

The specification of objection is as follows: For the reason that with intent to conceal his true financial condition, he has failed to keep books of account or records, and has destroyed books of account or records, from which such financial condition might be ascertained.

Among the unsigned and unfiled papers in this record, is what purports to be a deposition of Julius Runge. This, together with the depositions of the bankrupt himself, constitutes all the alleged testimony upon the hearing. In this deposition of Runge, he testifies that he is the receiver and trustee in the case. He said he found the books very confusing. The only books that were turned over were some books, showing daily sale, and a journal and a ledger, but that it was difficult for him to find out what Freshman was paying for expenses, and what he had paid to Rudberg for rent and to the porter, and that he could not learn from the books the [fol. 57] bankrupt's financial condition. He testified further that the estate would pay nothing to common creditors. That is all of Runge's testimony, even if it were signed and could be considered in the case.

Freshman was called to the stand by the opposing creditors. At the beginning of this testimony, it was shown that the books were in the custody of the trustee and not in the control of the bankrupt. Freshman testified that he kept part of his books, and that once in a while he had them examined by a bookkeeper. He testified further that he did not know his financial condition until he conferred with counsel a short time before filing the petition in bankruptcy. He said he did not keep any proper books, but that is the way all liquor dealers keep books. He testified that he kept his account with the bank by referring to his check book and pass book; that as to accounts owed merchants, he kept a memorandum that he could understand, and that he kept the invoices and from that he could generally find out how he stood with the merchants. He testified further that he could not tell from the books what assets he had on hand. He testified that he only dealt principally with two houses. He stated that in 1915, he bought some property out of town, and began to sell his notes to raise cash. He said that in that time he was in pretty good shape. He stated on page 15 that to pay the first notes issued, he would sell new notes, and

with that money pay the old notes. He stated on page 15 that he did not keep a record of the notes which he issued to White and which White sold. The only thing he kept was a check book. On [fol. 58] page 18 he said he never had any special agreement with White, that he merely told White that he had this or that debt to meet and needed the money, and thereupon, White would go sell his notes, and give him part of the money. He said some of this money went to White, some went to pay debts, and some went to buy property for his minor son. The only testimony as to why he never kept these books was his answer to questions to the effect that he had no partner, that he had nobody to divide up with, and it was not therefore essential to keep any record except that record which he in fact, did keep, that is he had a record of everything he owed for merchandise, and what he owed the bank, and it was not necessary for him to know at any particular time what assets he had on hand. As to the notes which he issued to White and which White sold, he explained that that was not a complicated matter, that he would issue one note to White and White would go sell that, and later on, he would sell another note and get money to pay off the first note, so that there there were never so very many of these notes outstanding at any one time. On cross examination he testified that he began business in Dallas, in 1883, in the retail liquor business, and that he did not keep any books at all. The court excluded this testimony, but I feel sure the court ought to consider it as legitimate evidence upon the issue of why he failed to keep books, if he so failed. He stated that he had a bookkeeper for the purpose of keeping the revenue books, but for no other purpose. He testified that he never did keep a bills payable account. He testified [fol. 59] on page 37 that there was never a time when he was in business, that one could go to his books and find out what notes he had outstanding. He said that the reason was he never had anyone to divide up with. He was always sole owner, and therefore, never saw any necessity of keeping books. He stated that he kept small books in which he always wrote down daily receipts and what he paid out during the day. This went back ten or fifteen years and those books were then in court. That is about all there is in the record as to why he failed to keep books, and what books he did keep, and what books he did not keep. We contend that the deposition taken at the first meeting of the creditors is no part of this record. However, if you go to consider it, you will find that it carries out about the same idea, that during all the time Freshman was in business, he kept a crude lot of books from which he could tell in a general way what he did each day. He could tell from his books generally what he owed various parties from whom he had bought merchandise, what he had in the bank and what he owed the bank, but he could never tell from his books what property he had on hand in the way of merchandise. He would have to take an inventory to prove that. Also that he never did keep a set of books showing what he owed people on notes. As a matter of fact, he never did owe many people on notes, until about 1913, when he began to

speculate in land, he got to where he needed more money than he had. The first thing he did was to give a note for several thousand dollars to Oral C. White, and asked him to go and see if he could [fol. 60] cash it for Freshman. At that time, Freshman stood by reputation, as quite a wealthy man, and there was no trouble much to cash his note. This first note was cashed by White and he retained part of the proceeds and returned part of the proceeds to Freshman. Pretty soon, Freshman, either to pay that note or to pay other indebtedness, he needed more money, and he gave another note to White, and White went and cashed that and returned part of the proceeds to Freshman. This went on over a period of a great many months and it is stated by the counsel for the trustee that they all total some Thirty Thousand Dollars ($30,000.00). There is nothing else in the record to indicate that but a mere statement of counsel as I recall. The facts are however, that the amounts of these notes did run up to a considerable total. The amount of them did not represent, however, the amount of new money obtained by Freshman. It merely meant the amount of notes which Freshman cashed, either to pay off former notes or other debts, or make investments. This is all there is as to the testimony in the case.

Authorities

Collier on Bankruptcy, last edition, page 381. In re Blalock 118 Fed. Rep. 679. In re Keefer 135 Fed. 885. In re Brockman 168 Fed. 1015. In re Brown 199 Fed. 356. In re Rivas 268 Fed. 690. In re Croonborg 268 Fed. 352.

[fol. 61] Argument

Under all the authorities, to prevent a discharge for either of the grounds urged by the objecting creditors, the burden is upon the creditors to prove by clear and convincing evidence, not only that the bankrupt failed to keep books of account, but that he did it for the purpose of concealing his financial condition. Also all the authorities established the proposition that the intent to conceal will not be presumed from the mere failure to keep the books. There is nothing whatever in this record to show any intent to conceal his condition on the part of Freshman. The case has been conducted all the way through on the theory that all the objecting creditors had to do was to prove a failure to keep a perfect set of books. There has been no effort whatever to prove any wrongful intent. The record briefly shows that Sam Freshman had always been in business for himself. He had never had any partner. He kept little memorandum of daily transactions, he kept books that showed what he owed the bank, and what money he had in the bank, he kept books and invoices that showed what he owed other people, but he never did keep accurate inventory of sales or of stock purchased. Again he did not keep accurate record of the notes which he issued to other people, besides

the bank. He thought however, he could always keep knowledge of them in his mind. The great complaint seems to be against this bankrupt on account of his transactions with Oral C. White. Many years before his bankruptcy, Oral C. White induced Sam Freshman to buy what was represented to be oil land in Palo Pinto County. [fol. 62] When Freshman got short of money, he suggested the fact to White and asked White if he, White, could get the cash on a note of Freshman's. Freshman then had a fine reputation and therefore White could obtain the money on Freshman's note. Thereupon, Freshman gave White the note and White went and cashed it. As other payments for the land fell due, he gave White other notes which White went and cashed. As those notes came due and Freshman was not able to meet them, he gave other notes in renewal thereof. It is claimed by the attorneys for the objecting creditors, but no proof made thereof, that all these notes, original and renewal, amounted to Twenty or Thirty Thousand Dollars. Freshman says that he merely used this money to pay for this land, take care of his indebtedness, and to operate his business. He says he did not keep any accurate record of how many of these notes he had issued. It is this transaction alone that seems to have been the basis for the contention that he failed to keep books of account for the express purpose of concealing his financial condition. It is very evident that at the time he issued the first of these notes, and all of the original ones, and all of the notes except those issued to renew old notes, he was in a good financial condition, and so considered by himself and everybody else. However, it is claimed that this proof is sufficient from which to infer intent. The law says, however, that you cannot presume the intent from the mere failure. That is all however, that has been done or contended for in this case. The writer is of the opinion that every man who is in business alone could be [fol. 63] denied a discharge if Freshman can. The writer is of the opinion that no man, or at least none of the average of us who have no partners, keep any accurate records of our transactions. It will be contended that the law requires it and that we ought to do it. This is not so. The law permits us to fail to keep records just as much as we please, except that we must not fail with intent to conceal our financial condition. Freshman is an unlearned man as shown by the records. I dare say all the unlearned men who have started in business and by hard work climbed to success, have kept about the kind of books that Freshman kept. Freshman tells you that he did employ a man to keep his records for income purposes, and that so far as income purposes were concerned, he has never had any trouble with his books. It is apparent therefore that for all purposes which he understood it to be necessary to keep books, he kept them as the average man would have kept them. We respectfully submit that there is no evidence to support a denial of the discharge in this case. The law requires such proof to be clear and convincing, even if not beyond reasonable doubt.

Wherefore the bankrupt prays that his discharge be granted, or in the alternative that his application be referred to another Master,

with instructions to take testimony and report, and for such other and further relief as he may be entitled to.

J. H. Synnott, Atty. for the Bankrupt, Samuel Freshman.

[fol. 64] AFFIDAVIT OF L. C. MAYNARD ATTACHED TO SAID MOTION

STATE OF TEXAS,
County of Dallas, ss:

On this day personally appeared before me Louis C. Maynard, and being first duly sworn on oath, says:

My name is Louis C. Maynard, and I have been Clerk of the District Court of the United States for the Northern District of Texas since May 19, 1906.

There was filed in the Clerk's office, by Messrs. Synnott & Penry, attorneys at law, on Nov. 1, 1915, a voluntary petition for Samuel Freshman, same being docketed as No. 1211 in bankruptcy. May 12, 1916, an application was filed by the same Freshman for discharge, which was referred under the rulings to the Referee in Bankruptcy, at that time Eugene Marshall of Dallas, Texas. On August 25, 1916, the Citizens State Bank & Trust Company and George T. Atkins, by Irish & Thornton, their attorneys, filed notice of opposition to the application for discharge, and on August 26, 1916,specifications of objections were filed on behalf of said creditors, the only specification being:

"For the reason that with intent to conceal his true financial condition, he failed to keep books of account or records and has destroyed books of account or records, from which source his financial condition might be ascertained."

said objections and specifications being referred under the rules to Eugene Marshall, Esq., Referee in Bankruptcy.

[fol. 65] On or about January 28, 1921, the Referee's report, together with records of testimony taken before the Referee, were returned to my office by E. M. Baker, Esq., Referee in Bankruptcy, with a recommendation as follows:

"To the Honorable Edward R. Meek, judge of the District Court of the Northern District of Texas:

"I have the honor of submitting herewith a memorandum by the late Eugene Marshall, deceased, Referee in Bankruptcy, made in the matter on the first day of February, 1917. The lamented Referee, although he did not sign said report, indicates that he recommended the said bankrupt should not be discharged, and after reading the testimony taken in this matter and submitted herewith, I am of the opinion that under Section 14 of the Bankruptcy Act, Clauses 2 and 3, that said bankrupt is not entitled to a discharge, and recommend that the application for discharge be denied.

Dated at Dallas, Texas, this 28th day of January, A. D. 1921.

(Signed) E. M. Baker, Referee in Bankruptcy."

Shortly after this report was filed in my office, I placed the same, acting on my own initiative in so doing, together with other certificates and reports from the Referee, before the Honorable Edward R. Meek, U. S. District Judge of the Northern District of Texas, but before same could be considered by him, he was called from Dallas, by the serious illness of his son, and was obliged to remain with him, [fol. 66] and did not return to Dallas until late in the fall of 1921.

During the winter of 1922 and up until the appointment of Honorable William H. Atwell, as an additional Judge for this District, the dockets and reports at Dallas were greatly congested, and it was impossible for the court to consider anything but the most urgent matters and cases, which were set down for trial at the request of one of the opposing parties. Neither of the parties interested in this cause has ever asked to have the same set down for hearing, and same, therefore, was not brought to the attention of the Court.

During the fall of 1922 Mr. Paul Carrington of the firm of Etheridge, McCormick & Bromberg, called at the Dallas office and looked through the record in Bankruptcy Cause No. 1211 and stated that he now represented Mr. Freshman and that he proposed to file a new voluntary petition in bankruptcy for him, and did so file a voluntary petition on November 11, 1922, numbered 1814, in which all the debts and claims originally scheduled in No. 1211 were again scheduled and thereafter filed an application for discharge in said cause, asking that he be discharged from all his debts including those scheduled in No. 1211.

Neither the bankrupt nor anyone on his behalf has attempted to effect a postponement of the presentation or consideration of the proceedings in relation to the discharge of Samuel Freshman save insofar as heretofore stated.

[fol. 67] On June 9, 1923, while the application for discharge in Cause No. 1814 was under consideration, the record relating to the application for discharge in Cause No. 1211 was delivered by me to Honorable William H. Atwell, United States District Judge, upon his request, and thereafter on June 9, the following order was made in Cause No. 1211:

"The recommendation of the Referee heretofore made on the 28th day of January, A. D., 1921, that the court deny a discharge to the bankrupt be, and the same is, hereby followed and such discharge is denied."

(Signed) Louis C. Maynard.

Subscribed and sworn to before me this the 16th day of June, 1923. (Signed) D. A. Campbell, Notary Public, Dallas County, Texas. (Seal.)

In United States District Court

Bill of Exceptions of Bankrupt No. I and Order Settling Same—Filed June 18, 1923

Be it remembered that at a regular term of the above styled court which convened on the 7th day of May, A. D., 1923, and is still in session on this 18th day of June, A. D., 1923, the following proceedings were had and the following bill of exceptions was taken by the bankrupt to the proceedings as hereinafter indicated:

The motion of Samuel Freshman, Bankrupt, that the order granting a discharge in part and denying a discharge in part entered June [fol. 68] 9th, 1923, be reconsidered and vacated for a rehearing, and on such rehearing for the entry of an order granting discharge as prayed for, duly came on to be heard on the 18th day of June, A. D., 1923, before the Hon. William H. Atwell, United States District Judge for the Northern District of Texas, at Dallas, and the bankrupt with his attorneys of record appeared in support thereof; there was no appearance in opposition.

The said motion having been considered by the court, the bankrupt offered to introduce in support thereof the testimony of J. H. Synnott and L. C. Maynard, their testimony to be identically that shown by their affidavits attached to and incorporated in the said motion, which proffered evidence the court refused to admit otherwise than in the form of such affidavits, which affidavits were then offered and admitted in evidence and considered by the court.

There was no other evidence introduced or offered on the said motion.

After argument of counsel, the court concluded that the said motion should be overruled and requested attorneys for the bankrupt to prepare an order to such effect.

The foregoing bill of exceptions is approved by the undersigned attorneys of record for the bankrupt.

(Signed) Etheridge, McCormick & Bromberg, Paul Carrington.

Dallas, Texas, June 18th, 1923.

[fol. 69] The foregoing bill of exceptions is approved and directed to be filed as a part of the record in this case, this 18th day of June, A. D., 1923.

(Signed) Wm. H. Atwell, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION OF BANKRUPT THAT ORDER DENYING DISCHARGE IN PART AND GRANTING DISCHARGE IN PART, ENTERED JUNE 9TH, 1923, BE RECONSIDERED AND VACATED, FOR A REHEARING AND ON SUCH REHEARING FOR ENTRY OF AN ORDER GRANTING DISCHARGE AS PRAYED FOR—Filed June 8, 1923

On this 18th day of June, 1923, came on to be heard the motion of Samuel Freshman, bankrupt, that the order of this court entered June 9th, 1923, granting a discharge in part and denying a discharge in part, be reconsidered and vacated, for a rehearing, and on such rehearing, for the entry of an order granting a discharge as prayed for; there appeared in support of said motion the said bankrupt and his attorneys of record; there was no appearance in opposition.

Thereupon the motion having been read to the court, evidence having been proffered by the bankrupt and considered by the court, as shown by a bill of exceptions approved and filed herewith, and argument of counsel having been had, the court concluded that the said motion should be overruled.

[fol. 70] Therefore, said motion is hereby overruled, to which action the bankrupt excepted in open court and in open court gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit.

(Signed) Wm. H. Atwell, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed June 18, 1923

Samuel Freshman, bankrupt, conceiving himself aggrieved by the order entered in the above numbered and entitled cause on June 9th, 1923, granting a discharge to him in part and denying a discharge in part, and by the order entered therein on June 18th, 1923, denying to him a rehearing, hereby appeals from said orders to the United States Circuit Court of Appeals for the Fifth Circuit, for the same reasons specified in the assignment of errors which is filed herewith, and prays his appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said orders were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, prays that a citation may be granted, directed to W. S. Atkins, commanding him to appear before the United States Circuit Court of Appeals for the Fifth Circuit to do and receive that which may appertain to justice to be done in the [fol. 71] premises, and prays that the amount of an appeal bond herein be fixed in the premises.

(Signed) Etheridge, McCormick & Bromberg, Attorneys for Samuel Freshman, Appellant. Paul Carrington, Solicitor.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 18, 1923

Now at the time of his filing petition for appeal herein, and the allowance thereof, comes Samuel Freshman, bankrupt, and makes and files his assignment of errors as follows:

1. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because the specifications of objections filed by the objecting creditor were and are fatally defective and insufficient to raise any issue for determination by the court, the bankrupt therefore being entitled of right to his discharge as prayed for.

2. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because the [fol. 72] specifications of objection filed by the objecting creditor were and are wholly unsupported by any evidence.

3. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because the specifications of objection filed by the objecting creditor were abandoned and waived, as shown by the record of the proceedings had before the special master, by the absence of exception and objection to the findings and recommendations of the special master and by the absence of appearance in this court of the objecting creditor, and of any attorney on his behalf.

4. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because no objection or specification of objection was filed in this cause by or on behalf of any creditor, on the ground that, or averring that, the status of such former proceeding numbered 1211 precluded or in any way affected the granting of a discharge herein as prayed for.

5. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because there [fol. 73] is no showing in this record that there has ever been a final determination in the earlier proceeding numbered 1211 that the bankrupt is entitled or is not entitled to a discharge for any ground properly placed in issue in this cause, that is to say, such a final determination as may preclude or in any way affect the granting of a discharge herein as prayed for.

6. The court erred in overruling the motion of the bankrupt for a rehearing of the order denying a discharge in part and in not granting a discharge herein as prayed for on such a rehearing, be-

cause the uncontroverted evidence proffered by the bankrupt on the hearing of such motion shows that there has been no final determination in the bankruptcy proceeding numbered 1211 in bankruptcy, whether this bankrupt is entitled or is not entitled to a discharge for any ground properly placed in issue in this cause, that is to say, no final determination such as may preclude or in any way affect the granting of a discharge herein as prayed for.

For which errors found in the record, and because of each of them, the bankrupt, now the appellant, prays for a reversal of the order of the District Court of the United States for the Northern District of Texas, at Dallas, entered in this cause on June 9th, 1923, granting a discharge in part and denying a discharge in part, and a [fol. 74] reversal of the order of such court entered in this cause on June 18th, 1923, denying a rehearing on such order, and prays that the United States Circuit Court of Appeals for the Fifth Circuit, upon consideration of the record herein, grant the appellant a complete and final discharge; appellant further prays for such other relief as he may be entitled to.

(Signed) Etheridge, McCormick & Bromberg, Attorneys for Samuel Freshman, Appellant. Paul Carrington, Solicitor.

[File endorsement omitted.]

[fol. 75] Bond on Appeal for $250—Approved and filed June 18, 1923; omitted in printing

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[fol. 76] In United States District Court

Order Allowing Appeal—Filed June 18, 1923

It is ordered that the appeal prayed for in the petition for appeal filed and presented to the court on this day on behalf of Samuel Freshman, bankrupt, in the above numbered and entitled cause, be and the same is hereby allowed as therein prayed for; that the [fol. 77] said appellant in effecting his appeal shall execute his bond with sureties to be approved by this court in the sum of two hundred fifty and no/100 dollars ($250.00), in terms as required by law; and that an appeal bond in the amount above required having been presented to the court executed by the said appellant with surety satisfactory to the court, in terms required by law, the said bond is hereby approved.

Ordered at Dallas, this 18th day of June, A. D. 1923.

(Signed) Wm. H. Atwell, United States District Judge.

[File endorsement omitted.]

ORDER RE TESTIMONY—Filed June 19, 1923

An appeal having been perfected on June 18th, 1923, from the orders of this court in the above numbered and entitled cause of June 9th and June 18th, respectively; Samuel Freshman, the bankrupt, having been represented in all proceedings herein but W. S. Atkins, the appellee, not having been represented in any of such proceedings; the testimony taken before the referee being small in amount comprising in question and answer form less than six typewritten pages and the form thereof seeming of importance to the [fol. 78] appellant; the appellant having requested, pursuant to Equity Rule No. 75, that the testimony in such question and answer form be preserved in the record on appeal and be not translated to narrative form, and such request appearing to the court proper, it is hereby, this 19th day of June A. D. 1923, so directed and so ordered.

(Signed) Wm. H. Atwell, United States District Judge.

[File endorsement omitted.]

[fol. 79] CITATION—In usual form, showing service on W. S. Atkins; filed June 20, 1923; omitted in printing

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IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 19, 1923

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal allowed in the above numbered and entitled cause on the 18th day of June A. D. 1923, and to include in such tran- [fol. 80] script of record the following and no other papers, to-wit:

1. Caption.
2. Petition of bankrupt for discharge.
3. Notice of objection to discharge.
4. Specifications of objection to discharge.
5. Exceptions and demurrers of bankrupt to objection and specifications of objection to discharge.
6. Certificate of proceedings had before Hon. E. M. Baker, including his findings and recommendations.
7. Order directing that testimony taken before Hon. E. M. Baker be preserved in question and answer form.
8. Order of June 9th, 1923, granting discharge in part and denying discharge in part.
9. Written opinion announced by the District Court at the time of the entry of said order.
10. Motion of bankrupt that order granting discharge in part and denying discharge in part be reconsidered and vacated, for a

rehearing and on such rehearing for entry of an order granting discharge as prayed for.

11. Bankrupt's bill of exceptions No. 1.

[fol. 81] 12. Order overruling motion of bankrupt that order of June 9, 1923, be reconsidered and vacated, for a rehearing and on such rehearing for entry of an order granting a discharge as prayed for.

13. Petition for appeal.

14. Assignment of errors.

15. Bond on appeal.

16. Order allowing appeal, determining amount of appeal bond and approving appeal bond.

17. Citation on appeal with return thereon.

18. Præcipe for transcript of record.

19. Certificate of clerk.

Respectfully requested, (Signed) Etheridge, McCormick & Bromberg, Attorneys for Samuel Freshman, Appellant. (Signed) Paul Carrington, Solicitor.

To the Hon. L. C. Maynard, Clerk of the District Court of the United States for the Northern District of Texas, at Dallas.

[File endorsement omitted.]

[fol. 82] IN UNITED STATES DISTRICT COURT

CERTIFICATE OF CLERK

I, Louis C. Maynard, clerk of the district court of the United States for the Northern District of Texas, do hereby certify that the above and foregoing pages numbered consecutively 1 to 81, contain a full and correct copy of the pleadings, instruments and papers of every character filed, and of the proceedings had, in cause number 1814 in bankruptcy, styled "In the Matter of Samuel Freshman, Bankrupt," in so far as same relate to the application for discharge of said Samuel Freshman, as the same appear of record and on file in my office at Dallas, Texas, all as requested in the præcipe for transcript of record as set forth on page 79 above.

Witness the seal of said district court of the United States, and the name of the clerk thereof, this 30th day of June, A. D. 1923.

Louis C. Maynard, Clerk, by (Signed) Mary Conger, Deputy.
(Seal.)

[fol. 83] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4136

SAMUEL FRESHMAN

versus

W. S. ATKINS

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 7th, 1923

On this day this cause was called, and, after argument by Paul Carrington, Esq., for appellant, was submitted to the Court.

[fol. 84] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Appeal from the District Court of the United States for the Northern District of Texas

Paul Carrington (H. L. Bromberg, Paul Carrington, and Etheridge, McCormick & Bromberg, on the brief), for Appellant.

No Brief on file for Appellee.

Before Walker and Bryan, Circuit Judges, and Grubb, District Judge

OPINION OF THE COURT—Filed November 27th, 1923

GRUBB, District Judge:

This is an appeal from an order of the District Court for the Northern District of Texas denying the Appellant, who was the bankrupt, his discharge. The Appellee was an objecting creditor, who, however, failed to sustain his specifications of objections by offering proof, and the referee reported in favor of the discharge. He also reported to the District Judge that the bankrupt had filed a former petition in 1915, listing some of the identical creditors and claims, and had applied for a discharge in that proceeding; that the former referee, who had acted as Master, had reported in the [fol. 85] former case adversely to the discharge; that his report had never been acted upon, and was still pending. The objecting creditor in this proceeding has filed no specification of objection based upon the pendency of the former application, and has offered no proof in support of such objection. The report of the referee, in this case, was against denying the bankrupt his discharge because

of his former application for discharge, under his first petition. The District Judge, differing with the referee, denied the bankrupt his discharge solely because of the pendency of his former application. He also denied the bankrupt a discharge in the first proceeding, as recommended by the referee upon the merits and upon the objections of the Appellee filed in that case. This appeal is taken from the denial of the bankrupt's discharge upon his second application.

The Appellant contends that the District Judge erred in entertaining an objection on this ground since (1) there was neither pleading nor proof to support it, and the Judge was without power to act on his own motion, and to take judicial notice of the pendency and status of the other cause pending in his court; and (2) that the status of the bankrupt's first application furnished no reason for denying his discharge.

It is true that there was no appropriate pleading to present the issue, and that no proof was formally tendered on the hearing, and that the Judge acted on his own knowledge of the record of the first case and of the identity of the bankrupt in each case (as to both of which facts there is no dispute), supplemented by the report of the referee which certified the pendency of the former application by the same bankrupt; the adverse report made by the former referee, in which he joined; and that final action upon the first application had never been taken.

(1) The first question is whether the Judge had jurisdiction to [fol. 86] act, no objecting creditor having raised the issue, and whether he could act on his knowledge of the records of his own court in another cause, when not formally put in evidence upon the hearing before the referee. Section 14 of the Bankruptcy Act of 1898 provides that "the Judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest at such time as will give the trustee or other party in interest a reasonable opportunity to be fully heard and investigate the merits of the application and discharge the applicant unless, etc.,". We think the language of Section 14 is sufficient to vest in the District Judge authority to "investigate the merits of the application" of his own motion and in the absence of pleading filed by an objecting creditor raising the issue and that General Order XXXII prescribing the procedure to be taken upon the hearing of specifications of objecting creditors, does not preclude the District Judge from taking independent action upon his own initiative. His duty is both to hear "such proofs and pleas as may be made in opposition thereto by the trustee or parties in interest", and to "investigate the merits of the application and discharge the applicant" unless legal cause against it exists.

We also think that no formal tender of proof is necessary, provided that District Judge is judicially informed of the facts he relies upon. If he acts in the absence of evidence offered upon the hearing, his action is only to be justified when he acts upon matters of record

in his court or upon admitted facts. In the present case he acted both upon his knowledge of the record of the former case in his own court, and upon the report of the referee to him of the fact of its pendency, its status, and of the identity of the bankrupt in each of the two cases.

(2) The second question is whether the pendency of the first [fol. 87] application by the bankrupt for his discharge, undisposed of, when the District Judge came to pass upon the second application judtified the denial of the discharge, under the second application, as to debts scheduled under both.

The bankrupt had a full hearing before the referee upon the first application. The referee had reported the matter to the District Judge in 1915 and no disposition of the report had been made up to November, 1922, when the bankrupt filed a second voluntary petition, nor when his second application for a discharge was made under it. As to the debts common to both petitions, final action under the first, whether the discharge was granted or denied, would be conclusive of the second. The filing of a second application by the same party for the identical relief while another was still pending in the same court, would constitute an abuse of the process of the court, which the District Judge would have the right to redress by denying a discharge upon the ground of the pendency of the first application. If the bankrupt had the right to apply repeatedly under voluntary petitions, successively filed by him, for a discharge, and if the District Judge was required to grant each application, if no party in interest appeared and filed objections, even though he knew of the pendency of the former applications, it would result that the bankrupt would eventually obtain his discharge by wearing out objecting creditors by means of such repeated applications. The District Judge, being disabled from acting on his own motion and unable to act on his knowledge of facts that would disentitle the bankrupt to a discharge, would, if Appellant's contention is correct, be powerless to prevent this evil. The bankrupt could suffer no injury from a denial of a discharge in the second proceeding, as to debts scheduled in the first, having left him a full opportunity to obtain his discharge as to such debts under his first application. Having that opportunity, he lost nothing by what was in effect the [fol. 88] dismissal without prejudice of his second application. The District Judge has since denied him a discharge under the first application upon the merits. It is open to him to appeal from that denial, and upon such appeal, present in this court the identical questions as to his right to a discharge from debts scheduled in both petitions, as he would have under the present appeal. He was granted a discharge in this case from all debts scheduled under the second petition only. If a discharge had been granted him as to the common debts, under the second application, and denied as to the same debts under the first application, an anomalous situation would have resulted. We think the orderly administration of justice could have been accomplished only through the method

adopted by the District Judge by denying the discharge under the second application as to common debts, and granting it as to others. The order of the District Court to this effect is affirmed.

[fols. 89-91] IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT

Extract from the Minutes of November 27th, 1923

[Title omitted]

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Samuel Freshman, and the surety on the appeal bond herein, Massachusetts Bonding & Insurance Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 92] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING—Filed Dec. 17, 1923

To the honorable the judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Samuel Freshman, appellant, petitions that the court set aside its order entered herein on November 26th, 1923, affirming the orders of the District Court of the United States, for the Northern District of Texas, entered June 9th, 1923, and June 18th, 1923, in the cause pending on its bankruptcy docket numbered 1814 in bankruptcy, re Samuel Freshman, bankrupt, that the court grant [fol. 93] a rehearing on this petition and that on such rehearing the said orders of the district court be reversed and appellant granted a complete and final discharge, all costs being taxed against appellee. As grounds for such petition, appellant submits the following:

1. There being no appropriate pleading presenting and no proof supporting either objection or specification of objection to a complete and final discharge of appellant in this case, it was the duty of the district court and is the duty of this court to grant the discharge.

2. In concluding that a district judge may deny a discharge in whole or in part, based on his investigation of the merits of the application, when there is no appropriate pleading and no proof supporting objection or specification of objection, this court has erred in disregarding and refusing to follow:

a. The Supreme Court in Bluthenthal v. Jones, 208 U. S. 64.

b. The interpretation (dictum) of that Supreme Court decision heretofore given by this court, in re Bacon, 193 Fed. 34, 37.

c. The Circuit Court of Appeals for the First Circuit, in re Marshall Paper Co., 102 Fed. 872.

d. The long line of decisions to the effect that one opposing a discharge must show by clear and convincing evidence that the bankrupt has committed one of six offenses defined in section 14-b of the act, the most recent of several decisions by this court to such effect being Humphries v. Nalley, 269 Fed. 607.

[fol. 94] 3. In concluding that the district court did not err in denying the discharge in part based solely on judicial notice of the status or existence of the earlier bankruptcy proceedings, and in the absence of appropriate objection or specification of objection, and of proof in support thereof, this court has erred in disregarding and in refusing to follow:

a. The long line of decisions that res adjudicata must be pleaded (appellant's brief 14) and proved (appellant's brief 17-18).

b. The long line of decisions that defense of another action pending can be set up only by plea in abatement, and is waived if not so pleaded (1 Corpus Juris 101 and notes) and when pleaded may be sustained only by evidence satisfying the burden of proof (1 Corpus Juris 106 and notes).

4. In concluding that the district court did not err in denying the discharge in part based solely on the status of the earlier bankruptcy proceedings, the court erred, for such status if properly pleaded and proved as a ground for objection, would have constituted no ground for the denial of the discharge in whole or in part.

In the premises, appellant submits that the court has erred in matters of law above set forth and that for each of the grounds referred to, he is entitled to his final and complete discharge as prayed for.

Because the reasons advanced by this court in its opinion for [fol. 95] denying the discharge in part were not referred to by the district court, and because appellant had no occasion to anticipate the reasoning adopted by this court and, therefore, did not refer in his brief to cases which this court may not have had before it and appears to have disregarded, appellant appends to this petition a short argument directed to the new propositions raised in the opinion

of the court and requests the court to consider the same in support of this petition.

Copies of this petition have been duly delivered to appellee.

A certificate in support of this petition is appended hereto.

H. L. Bromberg, Paul Carrington, Attorneys for petitioner.
Etheridge, McCormick & Bromberg, of Counsel.

Dallas, Texas, December 13th, 1923.

CERTIFICATE IN SUPPORT OF PETITION

Each of the undersigned, an attorney and and counsellor duly admitted to practice in this court and an attorney for appellant, in presenting to this court the foregoing petition for rehearing, does hereby certify that in his opinion the petition is well founded and meritorious and that the same is not made for the purpose of delay.

H. L. Bromberg, Paul Carrington.

[fol. 96] ARGUMENT IN SUPPORT OF PETITION

In the absence of appropriate objection and specification of objection to the discharge and of proof in support thereof, the bankrupt is entitled of right to his discharge. The Bankruptcy Act, section 14-b, provides:

"The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustees or other parties in interest at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless * * * (he has committed one of the six defined offenses)"

From a reading of this statute alone it seems clearly intended that the judge shall consider, in passing upon the question of discharge, the application for discharge, the pleading in opposition thereto and such evidence as the parties upon reasonable opportunity so to do shall submit, and that unless it is clearly shown by such evidence that one of the six defined offenses has been committed a discharge shall be granted. This has been the uniform construction of the statute with the exception of the opinions rendered in the present case.

The Supreme Court in Bluthenthal v. Jones, 208 U. S. 64, in the excerpt quoted in appellant's brief, pages 15 and 16, has held that it is the duty of a creditor, if he would prevent the granting of a discharge, to file objections and to prove (p. 66):

"either by the production of evidence or by the showing that in a [fol. 97] previous bankrutcy proceeding it had been conclusively

adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses,"

failing which the judge "was, by the terms of the statute, bound to grant" the application for discharge. In the paragraph so quoted the Supreme Court has stated, as we understand, that the investigation of the merits of the application for discharge which the judge may make, shall be limited to an investigation and consideration of the pleading and evidence before him.

This court has heretofore considered the decision of Bluthenthal v. Jones and its application to the issue of discharge under a second petition. This court said, in re Bacon, 193 Fed. 34, after quoting the paragraph referred to from the Supreme Court opinion (page 37):

"From this it appears to be required that the granting of the discharge under a second petition be resisted by objecting creditors with claims provable under a first petition."

The interpretation placed by this court on Bluthenthal v. Jones is, we submit, clearly correct, and its application to the present case should be conclusive to the effect that in the absence of appropriate resistance by any party in interest the discharge should be granted.

The Circuit Court of Appeals for the First Circuit carefully considered the purpose and effect of the clause in the statute directing the judge to "investigate the merits of the application": in re Marshall Paper Company, 102 Fed. 872. Judge Lowell, sitting in the District Court of Massachusetts, held that there was no merit in the application for discharge on a ground not specified by credi- [fol. 98] ters: in re Marshall Paper Company, 95 Fed. 419. The district judge relied on the clause in question (p. 422):

"It should be observed, however, that under the existing bankruptcy act the duties of the judge regarding discharge are more onerous that those imposed by the Act of 1867. He is directed to 'investigate the merits of the application', and hence is not confined to the consideration of those objections to the discharge which are properly set forth by creditors."

The Circuit Court of Appeals unanimously reversed Judge Lowell. After quoting section 14-b of the Bankruptcy Act and stating that the bankrupt is entitled to a discharge as a matter of right, provided he has not committed one of the offenses enumerated, the court said (102 Fed. 874):

"By this provision, the judge shall hear the application and discharge the applicant unless he is found guilty of some one of the prescribed offenses. The court is not authorized to deny the application for discharge upon a ground not set forth in this section. In re Black (D. C.), 97 Fed. 493. A refusal to grant a discharge cannot be said to rest in the discretion of the Judge. The words, 'investage the merits of the application,' must be taken in con-

nection with the context. To construe these words as if they stood alone and disconnect them from what follows would be to leave the whole question of discharge in the discretion of the court. Looking at the entire section, we do not think these words will bear such a construction, however desirable it may seem to the court in [fol. 99] a particular case to so interpret them. It seems to us that Congress in this section clearly specifies the only causes for which a discharge can be denied, and leaves to the court the sole duty of deciding, after due hearing, whether such cause exists.

"When the bankrupt files his petition for a discharge, the only facts pleadable in opposition thereto are those which show that, under the provisions of section 14, he is not entitled to a discharge. In other words, it must be shown that he has committed some one of the offenses described; otherwise the judge 'shall' discharge the applicant."

We submit that this decision which has been cited with approval in many subsequent cases, though none of the subsequent cases appear to have raised the issue now under discussion, is clearly correct. It is consistent, whereas we submit the opinion of this court herein is inconsistent, with the long line of decisions by this and all other Circuit Courts of Appeals to the effect that a discharge must be granted, unless the commission of one of the six offenses "be shown by clear and convincing evidence." Cases by this court to such effect are:

Humphries v. Nalley, 269 Fed. 607;
Garry v. Jefferson Bank, 186 Fed. 461;
Hardie v. Swafford Bros. Dry Goods Co., 165 Fed. 588.

At least one decision to the same or a similar effect has been rendered by each of the other Circuit Courts of Appeals.

The imposition of such a burden of proof upon the one opposing a discharge is meaningless, if the judge on his own initiative may investigate the merits and deny the discharge solely upon such in- [fol. 100] vestigation. No reason is perceived why, if such an investigation be permitted, it would be limited to an investigation by the judge of the records of his own court, or to matters of which it has been heretofore decided that a court may, under proper pleading and proof, take judicial notice. Even if the investigation be limited as suggested, many of the evils of star chamber proceedings would necessarily be attendant, and the granting or denying of a discharge might be made in some cases a matter entirely discretionary with the judge, and practically impossible of review.

For example, if in a previous suit by Atkins against Freshman, in the judge's court, the uncontradicted evidence supporting a default judgment in favor of Atkins on his debt, had shown that Freshman had obtained money from Atkins upon a materially false statement in writing made by Freshman for the purpose of obtaining credit from Atkins, would the judge in a later bankruptcy proceeding filed by Freshman, in which no objection had been made to his

discharge, be justified in taking cognizance of the record of evidence in the preceding case and in denying the discharge on his own initiative on such account? Our courts have uniformly held, pursuant to the deep-rooted Anglo-Saxon conception of litigation, that the decision of a cause must depend upon the issues raised by the parties and upon the evidence introduced. Inquisitorial methods of procedure known in the civil law have never been adopted by our courts. In the hypothetical case, the uncontradicted evidence in the earlier case, even should it have been explicitly adjudicated to have been true and correct, could not properly be considered by the judge [fol. 101] in the later case, certainly unless properly introduced in evidence on proper issues raised by pleadings. Res adjudicata must be pleaded and proved.

The present case is, we think, more clearly unjustifiable than the hypothetical one. The district judge when considering the recommendations of the referee herein took judical notice not of any previous adjudication but merely of a pending case in which had been filed a narrative of testimony unsigned by witnesses or by stenographer with an attached set of conclusions thereon not signed or finally approved by a deceased master who, it is shown, considered the conclusions therein expressed as merely tentative, there being also attached a recommendation by a newly appointed referee who had not heard the witnesses testify, resting solely on the tentative conclusions of his predecessor. Based solely on judicial notice of the pendency of such a case containing such a record, a discharge herein was denied. On which one of the six grounds enumerated in the statute can such a denial be based?

The denial of the discharge in part herein can be justified only by the determination by this court that the investigation by the judge properly showed that appellant had committed one of the six offenses defined in section 14-b. In his written opinion (Tr. 32-37) the district judge did not refer to his investigation other than to show the pendency of the earlier proceeding; his opinion does not indicate any conclusion that any one of the six defined offenses had been committed. The discharge herein was denied solely because of laches in the earlier proceeding and that is not a proper ground for denial of a discharge (appellant's brief 26-31).

A more clear example of the injustice of a procedure which would [fol. 102] permit the judge to take cognizance of grounds for denying a discharge and to deny a discharge on such grounds in the absence of opposition, could not be presented; even if laches were a valid ground for denying a discharge, delay could not be held conclusive; explanation for it should be permitted and an opportunity for such explanation is not afforded when in the absence of pleading or proof relating to the question, the judge may at his discretion determine the question based upon an investigation made upon his own initiative.

There is in substance the same sort of controversy involved in the present case, though other creditors are also here involved, as there would be if Atkins were prosecuting a suit against Freshman on his debt. The question in each case is whether the debt of Freshman to

Atkins is and shall remain a subsisting obligation. The court is not a guardian or trustee for either of the parties in either case. Atkins, let us assume, filed suit and upon a trial after due hearing it was finally determined that he should take nothing. If thereafter Atkins should bring a second suit on the same indebtedness, it would be the duty of the court clearly, if Freshman did not plead res adjudicata and was in default, to render judgment for Atkins on the same claim which had been previously determined to be unfounded. In such event the duty would have been upon Freshman to plead his defense in the second suit by res adjudicata or otherwise to avoid a default. If by paying court costs and expenses incident to repeatedly unsuccessful litigation, Atkins could finally obtain a judgment by [fol. 103] default, the judgment would nevertheless be valid. Courts have uniformly so decided. Res adjudicata must be pleaded and proved.

With even greater reason, the courts have also decided uniformly that the defense of a suit pending must be pleaded and proved or else is waived: 1 Corpus Juris, 101 and notes, 106 and notes; In re Buchan's Soap Corporation, 169 Fed. 1017; Stephens v. Monongahela Bank, 111 U. S. 197.

The opinion of the district court herein, shows that the discharge was denied in part herein, not because the judge after investigation had concluded that the bankrupt had committed one of the six defined offenses, but because he had concluded that the bankrupt had been guilty of laches in not obtaining a determination of the first suit. The judge had control of the cases on his docket, and in permitting the later case to be submitted to him for determination first, in overruling the motion for rehearing in the later case while the motion in the first was still pending, and in permitting such motion to remain pending until this appeal is determined, has shown that the issue in neither case now involves the question whether in fact appellant committed one of the six offenses. There remains no proponent insisting that appellant did so, in either case. The only issue in either case is one of law, as the district court has treated the two cases; the issue in the first, whether laches has precluded the bankrupt from a discharge; the issue in the second, whether laches in the first case can in any way affect the right of the bankrupt to a discharge in the absence of opposition.

An affirmance of the case in the circumstances, is an approval of the conclusion that laches in the first proceeding precludes a dis- [fol. 104] charge as to the debts in question, in both proceedings. That issue decided here in the affirmative will determine the case still pending in the district court; determine it not on the issue once raised but long since abandoned by the deceased opposition, but on an issue of law squarely raised in the present record, whether laches, found by a court on its own motion, without pleading or proof, is a ground for denial of a discharge.

In affirming this case, this court will hold that it is a valid ground, and in addition that a court may invoke laches in a previous case as a ground for denying a discharge in a second case, in the absence of pleading and of proof.

If the district judge is affirmed in the present case, will not his denial of a discharge in the case still pending before him follow as a matter of course, and be justified—a denial on the ground of laches, and also on the ground that, by judicial notice of records in his own court, on his own initiative, he will know that a discharge as to all debts then before him will have been finally denied, and the denial affirmed by this court?

In the premises appellant submits that this court has erred in affirming the orders of the district court and that on rehearing the discharge as prayed for should be granted.

H. L. Bromberg, Paul Carrington, Attorneys for Appellant
Etheridge, McCormick & Bromberg, of Counsel.

Dallas, Texas, December 13th, 1923.

[fol. 105] In United States Circuit Court of Appeals

[Title omitted]

Order Overruling Petition for Rehearing

Extract from the Minutes of December 24th, 1923

It is ordered by the Court that the petition for re-hearing, filed in this cause, be, and the same is hereby, denied.

[fol. 106] In United States Circuit Court of Appeals

Clerk's Certificate

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 83 to 105 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said court, numbered 4136, wherein Samuel Freshman is appellant, and W. S. Atkins is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 82 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 17th day of January, A. D. 1924.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal of United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 107] IN SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

ORDER GRANTING PETITION FOR CERTIORARI—Filed April 7, 1924

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Fifth Circuit and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1923 1925

No. 840. 300 41

SAMUEL FRESHMAN, Petitioner,

versus

W. S. ATKINS, Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit; Brief in Support Thereof; Appearance for Petitioner; Notice to Respondent.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Attorneys for Petitioner.

INDEX.

TABLE OF CASES.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1923.

No. 840.

SAMUEL FRESHMAN, Petitioner,

versus

W. S. ATKINS, Respondent.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Samuel Freshman, petitioner, represents:

On November 14, 1922, petitioner was adjudged a bankrupt by order of the District Court of the United States for the Northern District of Texas, at Dallas, he having but a few days theretofore filed a voluntary peti-

tion in bankruptcy. On February 18, 1923, he seasonably filed application for discharge (Tr. 3). Though he had many creditors, notice of objection and specifications of objections to such application (Tr. 3, 4) were filed by only one person, respondent.

Petitioner filed exceptions and demurrers to such objection and specifications of objection (Tr. 6) which were each overruled by the referee, acting as special master on the question of discharge (Tr. 12), to which petitioner excepted.

Thereupon a hearing was had before the special master on April 27, 1923, at which respondent was present in person but not represented by attorneys; at such hearing respondent stated in open court that he had no evidence to proffer (Tr. 13) and that he did not desire further time within which to procure witnesses or to employ attorneys, since he did not want to "send good money after bad" (Tr. 15).

The master then on his own motion interrogated petitioner, after which he dictated in open court, in the presence of petitioner and respondent, findings that each specification was wholly unsupported by evidence, evidence to the contrary being uncontradicted, and a recommendation that the discharge as prayed for be granted (Tr. 7). Respondent made no objection of any character to such action of the master (Tr. 23, 31), in effect abandoning his opposition.

Such findings and recommendations came on to be heard in the district court and petitioner appeared by attorneys; there was no appearance in opposition (Tr. 31). Thereupon the district court entered an order on June 9, 1923, granting the discharge in part and denying

the discharge in part, the denial being as to all creditors listed in the petition in bankruptcy filed by petitioner in the same court in November 1915 (Tr. 32). The denial of the discharge in part was based, as evidenced by the written opinion of the district court filed at the time of the entry of said order (Tr. 32), not upon any specification or objection of respondent or any creditor, but upon judicial knowledge of the pendency and status of the earlier bankruptcy proceeding (Tr. 36). The court on its own motion, on the basis of judicial notice only, determined that petitioner by **laches** in not obtaining a final determination of the earlier proceeding, in which the question had not been raised, had disentitled himself to a discharge, and that the question of discharge as to debts scheduled in the earlier, was therefore res adjudicata in the present case.

From this order of the court, petitioner seasonably filed a motion for rehearing (Tr. 38); on the hearing on such motion, evidence was introduced on behalf of petitioner (Tr. 68), detailing the history of the earlier bankruptcy proceeding and showing without contradiction that no final order had ever been entered therein denying petitioner a discharge and that petitioner had never caused any delay in such proceeding (Tr. 43-67). No other evidence was introduced (Tr. 68). There was no other appearance on the hearing than that on behalf of petitioner (Tr. 69).

The motion was overruled on June 18, 1923, and on the same day petitioner perfected his appeal to the United States Circuit Court of Appeals for the Fifth Circuit where the cause, docketed as number 4136 in said court, was heard on brief and oral argument for petitioner, there being no appearance for respondent (Tr. 84).

By judgment entered November 27, 1923 (Tr. 89), the action of the trial court was affirmed (Tr. 84); the opinion of the court filed with such order (Tr. 84) did not refer to the propriety of denying a discharge on the ground of laches, particularly laches in another case in which the question had never been raised, in a case in which no appropriate pleading and no proof had been offered in opposition to the application for discharge, but was based solely upon the proposition that the action of the trial court was justified under the provisions of section 14-b of the Bankruptcy Act, authorizing the judge to "**investigate the merits of the application.**" Since, however, the district judge did not investigate the merits of petitioner's application, but relied upon laches as a ground for denial of the discharge and a ground for not investigating the merits of the pending application in either of the proceedings, the circuit court of appeals, in effect, necessarily approved the reasoning of the district court. Petition for rehearing (Tr. 92) was overruled on December 24, 1923 (Tr. 105).

Petitioner files herewith a certified copy of the transcript of record in this case, including proceedings in the circuit court of appeals.

The judgment now entered in this case is final unless reviewed by this court on certiorari and is erroneous for the **following general reasons** relied upon by petitioner for allowance of writ of certiorari:

First. It was the duty of the district court, in the absence of appropriate pleading presenting, and in the absence of proof supporting, either objection or specification of objection, to grant final and complete discharge to petitioner. The opinions in the present case to the effect that it had no such duty, are in conflict with the

statements of this court in **Bluthenthal v. Jones,** 208 United States 64.

Second. The denial of the discharge in part by the district court being based solely on judicial notice of the status of an earlier bankruptcy proceeding, the pendency of an undetermined application for discharge in which was considered by the district court as equivalent to a determination adverse to the application for discharge therein, for the purpose of rendering the question res adjudicata as to all debts scheduled in the earlier proceeding, the denial of the discharge in part in this proceeding relating to such debts, was erroneous because:

a. The district court could not properly so deny the discharge in part on account of the absence of pleading and of proof in the record concerning the status of the earlier proceeding; judicial notice in the premises was unjustified.

b. The court having denied the discharge without any evidence in the record regarding the status of the earlier proceeding and in the absence of pleading, erred in not granting the discharge after the introduction of uncontradicted evidence on motion for rehearing showing that the earlier proceeding had never been determined but was undisposed of and pending and, hence, that there had been no final determination therein upon which could be based pleading or proof of res adjudicata.

c. The district court erred in determining by judicial notice in the present case that the application for discharge in the earlier proceeding should be denied on the ground of laches, laches not being one of the six offenses defined in Section 14-b of the Bankruptcy Act, on which grounds alone a discharge may be denied, and in deeming the earlier proceeding finally determined for that reason to

the extent that it rendered the petition for discharge res adjudicata in the present case; the opinion of the district court to such effect, is in conflict with a line of decisions including that of the Circuit Court of Appeals for the Second Circuit, **In Re Glasberg,** 197 Federal 896.

Third. The affirmance of the district court by the circuit court of appeals not having been based on the grounds on which the district court acted but on a construction of section 14-b of the Bankruptcy Act which would permit a district judge in passing upon an application for discharge to investigate on his own motion and without opposition to the discharge by any creditor, the merits of the application, and would permit him in so doing to go beyond the record in the case before him, was erroneous because:

a. The rule of law announced by the circuit court of appeals, permitting such an investigation by a judge on his own motion and out of the record of a case will lead to determinations of applications for discharge at the pleasure and within the discretion of district judges without the possibility of adequate review by appellate courts.

b. The opinion of the circuit court of appeals has disregarded and refused to follow the opinion of this court in **Bluthenthal v. Jones,** 208 United States 64, that of the Circuit Court of Appeals for the First Circuit, **In Re Marshall Paper Co.,** 102 Federal 872, and the long and uninterrupted line of decisions by all circuit courts of appeals to the effect that one opposing a discharge must show by clear and convincing evidence that the bankrupt has committed one of the six offenses defined in section 14-b of the Bankruptcy Act.

c. Were the conclusion of the circuit court of appeals correct in that a judge in passing upon an appli-

cation for discharge may deny the application on his own motion and on investigation of the merits of the application beyond the record of the case before him, nevertheless the affirmance of the present case was erroneous for the reason that, as shown by the opinion of the district judge herein, the denial of the discharge in part in this case was not based upon any investigation of the merits of the application but upon the erroneous proposition of law that the failure of petitioner to obtain a final determination of his application for discharge in the earlier proceeding amounting to laches therein, might be deemed equivalent to a final determination of the earlier proceeding to the extent that the question might be held res adjudicata.

Wherefore, petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this, on a date certain, to be therein designated, a full and complete transcript of the record of all proceedings in this case, to the end that the case may be reviewed and determined by this court as provided by law, that the said judgment of the circuit court of appeals may be reversed and that your petitioner may have such other and further relief and remedy in the premises as this court may deem appropriate and in conformity with law.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Attorneys for Petitioner.

The State of Texas,
County of Dallas.

I, Francis Marion Etheridge, being first duly sworn, on oath state that I am one of the attorneys for petitioner in the above case and that I have read the above and foregoing petition and know the contents thereof and allegations therein to be true.

FRANCIS MARION ETHERIDGE.

Sworn to and subscribed before me, this 23rd day of February, A. D. 1924.

PAUL CARRINGTON,
[Seal] Notary Public, Dallas County, Texas.

I hereby certify that I have examined the foregoing petition and in my opinion, the said petition is well founded in law.

FRANCIS MARION ETHERIDGE,
Attorney.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

POINT ONE.

Petitioner was and is entitled to his discharge as prayed for unless the district court could properly deny such discharge insofar as relating to creditors listed in the earlier bankruptcy proceeding, based on judicial notice of the status of such earlier proceeding.

The record contained no objection or specification of objection to be considered by the district court. The district court so recognized by basing its action solely upon judicial notice of the earlier proceeding (Tr. 32). The circuit court of appeals so recognized as shown by its opinion to the effect that the district court was authorized on its own motion to investigate the merits of the application for discharge, it being expressly said in the opinion rendered by the circuit court of appeals (Tr. 85):

> "It is true that there was **no appropriate pleading** to present the issue and that **no proof** was formerly tendered on the hearing * * *."

More conclusively is this shown by the record of proceedings before the referee. The only notice of objection filed with the referee who acted as special master on the question of discharge, was a letter to him by respondent "representing the estate of George T. Atkins, deceased" (Tr. 3). Respondent thereafter as "objecting creditor" filed the only specifications of objection to the discharge of petitioner (Tr. 4). Petitioner excepted and demurred to such objection and specifications of objection as a whole (Tr. 6) for the reason that there was no showing that respondent was entitled as a creditor to file the same.

The record shows that George T. Atkins had been a creditor of appellant and that appellee became interested in the estate of George T. Atkins by virtue of the provisions of a will (Tr. 24). Despite this indefinite and uncertain showing that respondent was entitled to raise an issue, the master overruled the exception of petitioner, the same being preserved in the record (Tr. 25, 71).

Only four specifications of objection were filed by respondent. When these came on for hearing before the master, respondent appeared in person but without attorney. Thereupon respondent was asked by the master what evidence, if any, he desired to proffer in support of his specifications (Tr. 12). After the proffer of a single instrument which was clearly inadmissible and which the master refused to permit to be introduced in evidence, to which action respondent did not object (Tr. 13), respondent stated that he had no evidence to proffer and that he did not desire further time within which to procure witnesses or to employ attorneys saying that he did not want to "send good money after bad".

Thereupon the master on his own motion interrogated petitioner and at the conclusion of the hearing dictated, in the presence of respondent, his findings that none of the specifications were supported by any evidence, but that by uncontradicted evidence each was shown to be unfounded. Respondent made no objection of any character to such findings of the master (Tr. 23).

Upon the presentation of the findings and recommendations of the master to the district court, petitioner was represented by attorneys, but there was no appearance in opposition either on the original hearing on June 9th, 1923, when the district court entered the order denying the discharge in part, or on the subsequent hearing on

June 18th, 1923, when petitioner's motion for rehearing was overruled (Tr. 31, 69).

Though respondent was served with citation on appeal to the circuit court of appeals, no appearance on his behalf was therein entered either on original action by the court (Tr. 84) or on petition for rehearing (Tr. 105).

Unquestionably, there was no objection or specification of objection and no evidence on which the district court could act in denying a discharge in whole or in part; it could act only on judicial notice.

POINT TWO.

The district court could not properly deny the discharge in part because of the status of the earlier bankruptcy proceeding, for there was neither pleading nor proof in the record concerning the existence or status thereof; judicial notice in the premises was unjustified.

There was nothing in the objection or specifications of objection presented to the referee, in any way referring to any previous bankruptcy proceeding either as a basis for the denial of the discharge or otherwise (Tr. 3, 4). There was no pleading of the existence or status of such earlier proceeding.

On examination of petitioner by the master on his own motion, there was but a single question relating to the earlier proceeding (Tr. 21):

> "Q. You have referred to the earlier bankruptcy proceeding. (The reference was to loss of books by the trustee in the former proceeding and to the unsuccessful attempt of trustee therein to recover property from petitioner's minor son). Did you file an application for discharge there? If so, what is the status of that application now?"

The answer to this question (Tr. 21, 22) was that the previous application for discharge had not been finally acted upon but was yet pending.

This answer was not sufficient for a denial of the discharge in part by the district court and in fact was not the predicate for such action by the district court as indicated by its written opinion (Tr. 33):.

> "This court judicially knows, even though it has no actual knowledge, that this same bankrupt has an application pending in this court for a discharge, from practically the same debts and creditors that are scheduled in the present proceeding, and that, however, such discharge was recommended against by the referee, he has not pressed a hearing on such application but has allowed the years to run by and is now seeking through another proceeding the same thing that he was compelled to seek in the first proceeding, if he should have relief."

The district court on the basis of judicial notice of the status of such earlier proceeding, denied the discharge recommended by the master insofar as relating to the creditors listed in the earlier proceeding, having concluded that the question whether petitioner should have his discharge as to such creditors was **res adjudicata.**

This action of the district court was erroneous for the reason that there was no pleading referring in any way to such earlier proceeding. It is uniformly and conclusively held that a defense of res adjudicata must be affirmatively pleaded just as a defense of payment must be so pleaded. As a general proposition of law, this proposition so far as we have been able to ascertain has never before been questioned. As illustrative of many cases to such effect, we cite but a single case: **Harrison v.**

Remington Paper Company, Circuit Court of Appeals for the Eighth Circuit, 140 Federal 385.

This general proposition of law is logically applicable to the issue of discharge in bankruptcy. Whatever may or may not constitute a final decision of a question of discharge and may or may not, therefore, be relied upon as a basis for a plea of res adjudicata, and it is this question only which is referred to in the opinion of the district court, in no other bankruptcy case than this insofar as we have been able to learn has a discharge been denied on the ground of res adjudicata unless such a plea has been asserted affirmatively as a ground for denial of the discharge.

This court, in **Bluthenthal v. Jones,** 208 United States 64, unanimously held that a discharge granted in the absence of an affirmative pleading of res adjudicata, is valid and binding upon all parties, since a discharge may not be refused on the ground of a refusal in a previous bankruptcy case unless there is pleading and proof of res adjudicata. We quote from the opinion of Mr. Justice Moody rendered in 1908 (page 66):

> "Undoubtedly as in all other judicial proceedings, an adjudication refusing the discharge in bankruptcy finally determines for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal is based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, **it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced.** Plaintiffs in error failed to do this. When an application was made by the bankrupt in the District Court for the Southern District of Florida, the judge of that court **was, by the terms of**

the statute, bound to grant it unless upon investigation it appeared that the bankrupt had committed one of the six offenses as specified in section 14 of the Bankruptcy Act as amended. **An objecting creditor might have proved upon that application that the bankrupt had committed one of the acts which barred his discharge, either by the production of evidence or by the showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved, it would have taken the place of other evidence and have been final upon the parties to it. But nothing of this kind took place.** Bluthenthal and Bickart intentionally remained away from the court and allowed the discharge to be granted without objection. Since the debt due to the plaintiffs in error was a debt provable in the proceedings before the District Court of Florida and was not one of the debts exempted by the statute from the operation of the discharge, it was barred by that discharge."

The district court also erred in denying the discharge because of the status of the earlier proceeding, because there was no evidence in the record before it on which such a denial would have been justified even had there been a plea of res adjudicata. The only reference in the record (Tr. 21) was clearly inadmissible and the record was completely devoid of evidence which the court could properly consider. Consideration of the only reference in the record could not be the basis for an adverse action by the district court, for such evidence, if admissible, was incomplete and insufficient. Only by judicial notice as indicated by the written opinion of the district court (Tr. 33), could such an affirmative plea of res adjudicata, even if it had been filed, have been sustained. As a general

rule, it is well recognized that such judicial notice is improper. The reason for this is well stated in 15 Ruling Case Law, at page 1111:

> " * * * **the decision of a cause must depend upon the evidence introduced. If the court should recognize judicially facts adjudicated in another case it makes those facts, though unsupported by evidence in the case in hand, conclusive against the opposing party, while if they had been properly introduced they might have been met and overcome by him. So on a plea of res adjudicata a court cannot judicially notice that the matters in issue are the same as those in a former suit. Such matters must be pleaded and proved.**"

In support of this proposition citation is there made of a long list of cases including notes in various annotated reports. We consider the proposition conclusively determined and that it is necessary to refer to a few only of the many cases to such effect, cases in which judicial notice of proceedings in the same court is held improper, illustrating the application of the general rule irrespective of the question whether the former proceedings were had in the same or in another court:

Murphy v. Citizen's Bank, Arkansas, 100 Southwestern 894;

Pacific Iron & Steel Works v. Goerig, Washington, 104 Pacific, 151;

Pickens v. Coal River Co., West Virginia, 65 Southeastern 865;

Pye v. Wyatt, Texas Civil Appeals, 151 Southwestern 1086;

Matthews v. Matthews, Maryland, 77 Atlantic 249;

Ollschlager's Estate, Oregon, 89 Pacific 1049;
McCormick v. Herndon, Wisconsin, 31 Northwestern 303.

There being neither pleading nor proof of the status of the earlier proceeding in bankruptcy or even of the institution or pendency of the same in the record as presented to the district court and there being no issue raised in such record that a discharge should be denied on the ground of res adjudicata or on any other ground since the four specifications of objection had been abandoned, it was the duty of the district court to grant the discharged as prayed for.

POINT THREE.

If it had been proper for the district court to consider the status of the earlier bankruptcy proceeding in determining whether to grant the discharge as prayed for, the denial of such discharge in part was improper, for it is shown without contradiction in the record that the status of such proceeding constituted no ground for denial of the discharge in whole or in part.

At the time of the presentation of the record to the district court as stated in its written opinion, the earlier bankruptcy proceeding had not been determined but was still pending on a recommendation or purported recommendation and exceptions thereto (Tr. 33).

After the dictation of the written opinion by the district court herein, but before the entry of the order thereon, the district court considered the record in the earlier proceeding on its own motion and without notice to any one and on the same day entered an order deying the discharge (Tr. 32, 37, 47, 67).

Petitioner seasonably filed his motion for rehearing (Tr. 38) and attached to such motion affidavits showing the status of the earlier proceeding (Tr. 43-67). A hearing on such motion was had at which evidence was introduced according to the purport of such affidavits (Tr. 68) to the following effect:

The earlier proceeding was filed in November, 1915, and application for discharge therein was filed May 12th, 1916 (Tr. 43). Notice of opposition to this application was filed on August 25th, 1916, by Irish & Thornton, as attorneys for Citizens State Bank & Trust Company and George T. Atkins, and a specification thereon was filed on August 26th, 1916 (Tr. 44, 64). This, the only specification of objection to the application for the discharge, was referred to Honorable Eugene Marshall, the referee, as master (Tr. 64). Hearings were had before such master commencing February 1st, 1917, testimony of the bankrupt and the trustee in bankruptcy being introduced but not the books of the bankrupt which were then in custody of the trustee (Tr. 44). For a year after such hearings the master failed to perfect his record indicating in conversations with attorneys for the bankrupt that he was undecided (Tr. 44). On or about February 1st, 1917, the master had dictated a memorandum in which he expressed a conclusion that the discharge should be denied; the memorandum, however, had not been signed and in later conversations with attorneys for the bankrupt, the master promised that when he should become ready to make up his report, he would permit all parties to be heard as to the form of his findings and recommendations and give all a chance to file formal exceptions (Tr. 44). In 1918 the master died without having called the attorneys before him as he had agreed

to do and, insofar as known, without having taken any further action or cognizance of the case (Tr. 44). A new referee being appointed, he told attorneys for the bankrupt repeatedly in answering their inquiries, that the record of proceedings before the deceased master could not be found (Tr. 45). On January 28th, 1921, without notice having been given of the finding of such record or that any decision had been or would be made by the new referee (Tr. 45), such new referee filed in the district court his recommendation that the discharge be denied, as follows (Tr. 65):

> "I have the honor of submitting herewith a memorandum by the late Eugene Marshall, deceased, referee in bankruptcy, made in the matter on the 1st day of February, 1917. The lamented referee, although he did not sign said report, indicates that he recommended the said bankrupt should not be discharged, and after reading the testimony taken in this matter and submitted herewith, I am of the opinion that under section 14 of the Bankruptcy Act, clauses 2 and 3, the said bankrupt is not entitled to a discharge and recommend that the application for discharge be denied."

Long before the date of this instrument the firm of Irish & Thornton, the attorneys who had been opposing the discharge, had been dissolved and Mr. Thornton who had been looking after the matter for the objecting creditors, had been elected and had served a term as judge of a county court in Dallas County, Texas. Long prior to the date of such instrument the Citizens State Bank & Trust Company, one of the objecting creditors, had dissolved, and George T. Atkins, the other, had died (Tr. 46). No action of any character by either of the objecting creditors or by the attorneys for them was taken

in the proceedings after February 1st, 1917, the recommendation by the referee being without notice and on his own motion (Tr. 46). So soon as attorneys for the bankrupt learned of the filing of this recommendation, they filed exceptions thereto in the office of the district clerk (Tr. 51-63) in which a history of the cause was presented and in which it was asserted that the recommendation was improper in that the matter had never been referred to the new referee as a master, in that the purported recommendation of the deceased referee was never signed by him or decided upon by him, and in that the new referee had never seen the witnesses but had acted solely upon the unsigned memorandum of the old referee and the unsigned transcript of testimony of the witnesses. Such recommendation or purported recommendation and such exceptions were never acted upon, consideration of the same by Judge Meek having been postponed on one occasion because of serious illness of his son and further delays being occasioned by the greatly congested condition of the court docket (Tr. 65, 66). None of the parties interested had ever asked to have the same set down for hearing and the same was not heard or considered by the court before June 9th, 1923, when the court without notice to any of the parties took the same under consideration and entered the following order (Tr. 66, 67, 47):

> "The recommendation of the referee heretofore made on the 28th day of January, A. D. 1921, that the court deny a discharge to the bankrupt be, and the same is, hereby followed and such discharge is denied."

On June 15th, 1923, attorneys for the bankrupt in the earlier proceeding filed a motion to re-open and rehear

the question of discharge, incorporating in such motion the exceptions which they had theretofore filed in such cause and further asking for a dismissal of the specification of objection as abandoned (Tr. 47-63). Such motion at the time of the hearing in this cause on June 18th, 1923, was still pending and undisposed of (Tr. 47).

The foregoing, being the evidence introduced on June 18th, 1923, in support of the motion for rehearing, was uncontradicted and showed, first, that there had never been a final determination of the application for discharge or of the objection or specification of objection thereto in the earlier proceeding, the motion in such earlier proceeding of June 15th, 1923, being still pending and undisposed of; and second, that there was no proper basis for a final determination in such earlier proceeding that the discharge which had therein been applied for should be denied, because the deceased master, who only had heard and seen the witnesses testify had never made a recommendation, and because the objecting creditors and their attorneys had disappeared from the scene, their objection to the discharge having been abandoned.

With the status of the earlier proceeding thus established on rehearing, we submit that the denial in part of the discharge as prayed for, was improper. The earlier proceeding not having been determined but being undisposed of and pending, there was no final determination therein upon which could be based pleading or proof of res adjudicata. It is uniformly and conclusively determined that a plea of res adjudicata may be established only by a showing of a final determination of the identical question in a previous cause between the same parties or those in privity with them. Thus a plea of res adjudicata cannot lie where the earlier proceeding is pending and un-

disposed of either in the trial court or on appeal. A motion for new trial or to arrest a judgment will prevent that judgment being a final determination so long as such motion is pending and undisposed of, such that it may be set up to establish a plea of res adjudicata:

Blue Goose Mining Co. v. Northern Light Mining Co., Circuit Court of Appeals for the Ninth Circuit, 245 Federal 727;

Texas Trunk Railway Co. v. Jackson Brothers, Texas Supreme Court, 85 Texas 605;

Collins v. Metropolitan Life Insurance Company, Illinois, 83 Northeastern 542;

Rudolph v. German Mutual Fire Insurance Company, 71 Illinois 190;

Fulliam v. Drake, Iowa, 75 Northwestern 479.

Clearly, the motion pending and undisposed of in the earlier proceeding would preclude a showing of res adjudicata by pleading or proof. Certainly, res adjudicata may not be established by judicial notice of such status of the earlier proceeding.

The district court in its opinion recognized this general rule but asserted that there is an exception recognized in bankruptcy law. In support of this proposition, citation is made in the written opinion (Tr. 34, 35, 36) to several cases in which it is held that where a bankrupt fails to apply for a discharge within the twelve-month period prescribed by the Bankruptcy Act, his failure so to apply is equivalent to a determination that he is not entitled to a discharge, that in a subsequent bankruptcy proceeding such a failure to apply for a discharge may be pleaded as res adjudicata and shown in proof of such a plea, and that a plea so proved conclusively determines the contention of those opposing the discharge in the sec-

ond proceeding and entitles them to an order denying the discharge as to them. It is to be noted that every case cited by the district court was such a case and that in each there was opposition to the discharge in the second bankruptcy proceeding and that such opposition pleaded and proved the failure to apply for a discharge in the earlier proceeding. In no case relied upon by the district court is there an illustration of judicial notice.

Such authorities are, however, readily distinguishable from the present case. They follow logically from the provisions of the Bankruptcy Act, section 14-a, which permits the filing of an application for discharge only within a stipulated period after the adjudication of bankruptcy. Where, however, an application is filed within such stipulated period, its pendency thereafter may not be held, under the authorities cited, to be equivalent to an adverse determination.

The position of the district court was that the authorities discussed had some analogy to the case before it, it having concluded from judicial notice that petitioner had failed to prosecute with reasonable diligence his application for a discharge in the earlier proceeding though he filed his application within the twelve-month period and that because of laches the earlier proceeding might be deemed disposed of adversely to him.

It is to be noted that according to the uncontradicted evidence introduced on rehearing, the earlier proceeding came on for hearing before the master on the specification of objection in February, 1917, and that no unusual delay or laches on the part of anyone is or may be claimed up to that point. From the time of such hearing attorneys for the bankrupt, according to the uncontradicted evidence, diligently sought a determination of the question

by the master until his death, and their efforts thereafter were also unavailing because of the apparent loss of the record. So soon as attorneys for the bankrupt were advised of the action of the new referee, they filed their objections thereto in the district court. **From the time that the specification of objection was filed in 1916, the burden of proof rested upon the objecting creditors;** they were the proponents of the only issue to be determined by the court upon recommendation of the master and unless the issue raised by them should be determined as they contended after clear and convincing testimony to such effect, the bankrupt was entitled to his discharge of right. **The delay of several years was on the final determination of the issue raised on the specification of objection and the bankrupt at no time during the period of delay was the proponent of this issue.** Notwithstanding which fact diligence by attorneys for the bankrupt is shown by their uncontradicted testimony on rehearing. We submit that there can be no laches prejudicial to the rights of the bankrupt in such earlier proceeding or in these proceedings even if the efforts of his attorneys to have a final determination be ignored, for the reason that **the bankrupt was under no duty to proceed, not being the proponent of the issue.**

We further submit that if there has been an abandonment on the part of any one in such earlier proceedings, or any laches, it has been that of the opposing creditors, the proponents on the only issue, who have done nothing since February, 1917, and who, with their attorneys, have disappeared from the scene entirely long since. Were a motion to be presented in such earlier proceedings setting up such facts, of course we concede the court should not do it on its own motion, should the court not dismiss

the objection and specification as having been thus abandoned, especially in the absence of a proper record of proceedings before the deceased master?

Even were there laches on the part of the bankrupt, however, a discharge in the earlier proceeding could not be properly denied on such account for the Bankruptcy Act specifies six grounds for the denial of discharge, laches not being one of the six, and a discharge may be denied only upon one of such six grounds. Authorities to this effect are conclusive.

In Re Wolff, District Court for the Northern District of California, 132 Federal 396, an objecting creditor filed a motion to dismiss the bankrupt's application for discharge because the bankrupt had failed and neglected to prosecute the application. In his opinion on denial of such motion, Judge DeHaven said (page 397):

> "The facts stated in the affidavit are not such as to warrant the court in dismissing the bankrupt's petition for discharge. In Re Sutherland, Deady, 573, Fed. Cas. No. 13,640, is in point. In that case it is said:
>
> " 'When an appearance has been entered by any creditor against the discharge, the proceedings upon the petition are no longer under the exclusive control of the bankrupt; but the opposing creditor cannot then move to dismiss the petition, or that its prayer be denied, because the bankrupt is, or supposed to be, dilatory in bringing the matter on for hearing. The remedy of the creditor is to move the court to set down the matter for hearing upon the petition and his objection thereto, if any be filed.'
>
> "In addition to this, it may be said that the dismissal of the petition for discharge is, in legal effect, a denial of the same. Section 14 of the bankruptcy act (July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) specifies the causes for which a dis-

charge may be refused. **Laches of the bankrupt in not bringing on a trial of the issues raised by a creditor's opposition to his application for discharge is not one of the enumerated causes, and the court is not authorized to extend the provisions of that section, and refuse a discharge upon any other grounds than those therein set forth.** Brandenburg on Bankruptcy (3d Ed.) S. 377.

"Motion denied."

To the same effect is the case of **In Re Glasberg,** 197 Federal 896, decided by the Circuit Court of Appeals for the Second Circuit in 1912. There a motion of an objecting creditor to dismiss the application of the bankrupt for discharge on the ground of laches had been granted. The Circuit Court of Appeals reversed this order saying (page 897):

> **"Delay in bringing on the hearing is not a ground for refusing a discharge found in the act. It specifically enumerates what the grounds are and this is not one of them."**

In Re Neal, 270 Federal 289, opinion by District Judge Sibley, is a case in which the referee had made his recommendation in November, 1917, and in which the objection was made on final hearing before the court in September, 1919, that the discharge should be denied because of laches of the bankrupt. The court said (page 290):

> "Bankruptcy Act, section 14-a, provides for the filing of the application for discharge within a limited time and
>
> (b) 'The judge shall hear the application for discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest at such time as will give the trus-

tee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application, and discharge the applicant unless'—he has done one or more of six classes of acts minutely specified.

"**It will be observed that the language of section 14-b is directed wholly to the judge and not to the bankrupt and is mandatory in its terms.** While undoubtedly the applicant for discharge is under the usual duties of diligence imposed on suitors, they are not to be derived from or measured by the quoted section. The judge is commanded to do three things: (1) Hear the application for discharge and the proofs and pleas in opposition to it; (2) investigate the merits of the application; and (3) discharge the applicant unless he has done the things named in the statute.

"**To dismiss this application unheard, would be simply to fly in the face of this mandate.** The fact that from some unknown cause the hearing was not had seasonably will not warrant the judge in refusing to hear at all, in declining to investigate the merits of the application, or to discharge the applicant. It would be to amend the statute and add another specification to the grounds for refusing a discharge, to penalize a want of diligence in pressing for a hearing as heavily as the commission of the crimes and frauds mentioned in the section. **A bankruptcy case is one in equity. The extreme penalty for negligence in failing to press for a trial, as fixed by Equity Rule Number 57, is dismissal without prejudice;** but a dismissal of this application would be to bar a discharge entirely, for a new application could not now be filed in this case, nor could these debts be discharged even by another bankruptcy, In Re Silverman, 157 Fed. 675, and cases cited."

The district court could not, therefore, because of delay in the earlier proceeding, deny petitioner his discharge therein; more clearly is it true then that in the present case the district court could not properly treat the earlier case as a basis for res adjudicata, before even the attempt was made so to deny the discharge in the earlier proceeding on such ground.

It is to be noted that in each of the cases cited the question was raised not on motion of the court or by invocation of judicial notice, but on the insistence of an opposing creditor. In no other reported case that we have been able to discover has the question of laches been raised by a court on its own motion or passed upon by a court when raised by an opposing creditor on the basis of judicial notice. **The more clearly is the action of the district court unprecedented and erroneous when it is considered that the question of laches was raised on its own motion and determined on the basis of judicial notice only, not in the case in which the asserted laches occurred, but in a second case in which the court on its own motion and acting solely on the basis of judicial notice decided that the first case might be deemed finally determined to the extent that it might serve to render an issue, not raised in the second case but considered by the court on its own motion, res adjudicata.**

POINT FOUR.

The denial of the discharge herein cannot be justified by a construction of the statute permitting the district court to "investigate the merits of the application."

In the absence of appropriate objection and specification of objection to the discharge and of proof in support

thereof, the bankrupt is entitled of right to his discharge. The Bankruptcy Act, section 14-b, provides:

> "The **judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto** by the trustee or other parties in interest at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application **and discharge the applicant unless** * * * (he has committed one of six defined offenses)."

From a reading of this statute alone it seems clearly intended that the judge shall consider in passing upon the question of discharge the application for a discharge, the pleading in opposition thereto and such evidence as the parties with reasonable opportunity so to do shall submit, and that unless it is clearly shown by such evidence that one of the six defined offenses has been committed, a discharge should be granted. This has been the uniform construction of the statute with the exception of the opinions rendered in the present case.

This court in **Bluthenthal v. Jones**, as quoted on pages 13-14 above, has specifically held that it is the duty of a creditor, if he would prevent the granting of a discharge, to file objections and to prove:

> "either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses," (208 U. S. 66).

failing which the judge "**was, by the terms of the statute, bound to grant**" the application for a discharge. In the same paragraph, above quoted, this court has stated, as we understand, that the investigation of the merits of

the application for discharge which the judge may make shall be limited to an investigation and consideration of the pleading and evidence in the case before him.

The circuit court of appeals which has decided the present case has heretofore so construed the opinion in Bluthenthal v. Jones. That court said, **In Re Bacon,** 193 Federal 34, after quoting the paragraph referred to from the opinion of this court (page 37):

> "From this it appears to be required that the granting of the discharge under a second petition be resisted by objecting creditors with claims provable under a first petition."

The Circuit Court of Appeals for the First Circuit carefully considered the purpose and effect of the clause in the statute directing the judge "to investigate the merits of the application:" **In Re Marshall Paper Co.,** 102 Federal 872. Judge Lowell sitting in the District Court of Massachusetts, held that there was no merit in the application for discharge, basing his refusal on a ground not specified by creditors: **In Re Marshall Paper Co.,** 95 Federal 419. The district judge relied on the clause in question (page 422):

> "It should be observed, however, that under the existing bankruptcy act the duties of the judge regarding discharge are more onerous than those imposed by the Act of 1867. He is directed to **'investigate the merits of the application,'** and hence is not confined to the consideration of those objections to the discharge which are properly set forth by creditors."

The circuit court of appeals unanimously reversed Judge Lowell. After quoting section 14-b of the Bank-

ruptcy Act and stating that the bankrupt is entitled to a discharge as a matter of right, provided he has not committed one of the offenses enumerated, the court said (102 Federal 874):

> "By this provision, the judge shall hear the application and discharge the applicant unless he is found guilty of some one of the prescribed offenses. The court is not authorized to deny the application for discharge upon a ground not set forth in this section. In re Black (D. C.), 97 Fed. 493. A refusal to grant a discharge cannot be said to rest in the discretion of the judge. The words, **'investigate the merits of the application,'** must be taken in connection with the context. To construe these words as if they stood alone and disconnected from what follows would be to leave the whole question of discharge in the discretion of the court. Looking at the entire section, we do not think these words will bear such a construction, however desirable it may seem to the court in a particular case to so interpret them. It seems to us that Congress in this section clearly specifies the only causes for which a discharge can be denied, and leaves to the court the sole duty of deciding, after due hearing, whether such cause exists.
>
> "When the bankrupt files his petition for a discharge, the only facts pleadable in opposition thereto are those which show that, under the provisions of section 14, he is not entitled to a discharge. In other words, **it must be shown that he has committed some one of the offenses described; otherwise the judge 'shall' discharge the applicant.**"

This decision has been cited with approval in many subsequent cases though in none of them does the question now under discussion appear to have been raised. We submit that the decision is clearly correct; it is con-

sistent, whereas the opinion of the circuit court of appeals herein is inconsistent, we think, with the long line of decisions by all circuit courts of appeals to the effect that a discharge must be granted unless the commission of one of the six offenses "be shown by clear and convincing evidence." Cases to such effect by the circuit court of appeals which decided this case, are:

Humphries v. Nalley, 269 Federal 607;
Garry v. Jefferson Bank, 186 Federal 461;
Hardie v. Swafford Bros. Dry Goods Co., 165 Federal 588.

At least one decision to the same or a similar effect has been rendered by each of the other circuit courts of appeals.

The imposition of such a burden of proof upon the one opposing a discharge is meaningless if the judge on his own initiative may investigate the merits and deny the discharge solely upon such investigation. No reason is perceived why, if such an investigation be permitted, it would be limited to an investigation by the judge of the records of his own court or to matters of which it has been heretofore decided that a court may, under proper pleading and proof, take judicial notice. Even if the investigation be limited as suggested, many of the evils of star chamber proceedings would necessarily be attendant, and the granting or denying of a discharge might be made in some cases a matter entirely discretionary with the judge and **practically impossible of review.**

For example, if in a previous suit by Atkins against Freshman in the judge's court, the uncontradicted evidence supporting a default judgment in favor of Atkins on his debt, had shown that Freshman had obtained money from Atkins upon a materially false statement in

writing made by Freshman for the purpose of obtaining credit from Atkins, would the judge in a later bankruptcy proceeding filed by Freshman, in which no objection had been made to his discharge, be justified in taking cognizance of the record of evidence in the preceding case and in denying the discharge on his own initiative on such account? Our courts have uniformly held pursuant to the deep-rooted Anglo-Saxon conception of litigation, that the decision of a cause must depend upon the issues raised by the parties and upon the evidence introduced. Inquisitorial methods of procedure known in the civil law have never been adopted by our courts. In the hypothetical case, the uncontradicted evidence in the earlier case, even should it have been explicitly adjudicated to have been true and correct, could not be properly considered by the judge in the later case, certainly unless properly introduced in evidence on proper issues raised by pleadings. **Res adjudicata must be pleaded and proved.**

The present case is, we think, more clearly unjustifiable than the hypothetical one. The district judge when considering the recommendations of the referee herein, took judicial notice not of any previous adjudication nor of any record of testimony in the previous case, but merely of the length of pendency of such earlier case. Based solely on the proposition that the length of pendency of the earlier case conclusively showed laches, the discharge herein was denied. On which one of the six grounds enumerated in the statute can such a denial be based?

The denial of the discharge herein can be justified under the opinion of the circuit court of appeals only if it be shown that the district judge on investigation found that petitioner had committed one of the six offenses defined in section 14-b. The written opinion of the district

judge negatives that; his opinion does not indicate that he has found that petitioner has committed one of the six offenses. The discharge was denied by the district court solely because of laches and that is not a proper ground for denial of a discharge.

A more clear example of the injustice of a procedure which would permit the district judge to take cognizance of grounds for denying a discharge and to deny a discharge on such grounds in the absence of opposition, could not be presented; **even if laches were a valid ground for denying a discharge, delay could not be held conclusive; explanation for it should be permitted and an opportunity for such explanation is not afforded when in the absence of pleading and proof relating to the question, the judge may, at his discretion, determine the question based upon an investigation made upon his own initiative.**

There is involved in the present proceeding no abuse of the process of the courts. There is in substance the same sort of controversy involved, though other creditors are also here involved, as there would be if Atkins were prosecuting a suit against Freshman on his debt. The question in this and in the hypothetical case is whether the debt of Freshman to Atkins is and shall remain a subsisting obligation. The court is not a guardian or trustee for either of the parties in either case. Atkins, let us assume, filed suit and upon a trial after due hearing it was finally determined that he should take nothing. If thereafter Atkins should bring a second suit on the same indebtedness, it would be the duty of the court clearly, if Freshman did not plead res adjudicata and was in default, to render judgment for Atkins on the same claim which had been previously determined to be unfounded. In the hypothetical case the duty was upon

Freshman to plead his defense of res adjudicata or otherwise to avoid default in the second suit. If by assuming the hazard of court costs and expenses in the second suit, Atkins should thus obtain a judgment by default, the judgment would nevertheless be valid. Courts have uniformly so decided. **Res adjudicata must be pleaded and proved.** With even greater reason the courts have also decided uniformly that the defense of a suit pending must be pleaded and proved or else is waived.

The opinion of the district court herein shows that the discharge was denied in part, not because the judge after investigation concluded that the bankrupt had committed one of the six defined offenses, but because he had concluded that the bankrupt had been guilty of laches in not obtaining a determination of the first proceeding. The judge had control of the cases on his docket and in permitting the later case to be submitted to him for determination first, in overruling the motion for rehearing in the later case while the motion in the first was still pending, and in permitting such motion to remain pending while appeal in the later case was taken, has shown that the issue in neither case now involves the question whether in fact petitioner committed one of the six offenses. There remains no proponent insisting that petitioner did so in either case. The only issue in either case is one of law, as the district court has treated the two cases; the issue in the first, whether laches has precluded the bankrupt from discharge; the issue in the second, whether laches in the first case can in any way affect the right of the bankrupt to a discharge in the absence of opposition.

The affirmance of this case by the circuit court of appeals necessarily involved therefore an approval of the conclusion that laches in the first proceeding precluded a discharge as to the debts in question, in both proceedings. That issue if finally so decided in the present case, will determine the case pending in the district court notwithstanding the assumption of the circuit court of appeals to the contrary. That issue will determine the earlier case, not on the specification of objection once made and long since abandoned by the deceased opposition, but on an issue of law squarely raised in the present record, whether laches found by a court on its own motion, without pleading or proof, is a ground for denial of a discharge.

We, therefore, ask that the writ of certiorari applied for be granted and that the errors of the district court and the circuit court of appeals herein be corrected.

Respectfully submitted,

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Attorneys for Petitioner.

Dallas, Texas, February 21, 1924.

APPEARANCE FOR PETITIONER.

To the Clerk of the Supreme Court:

You will kindly file this instrument as our appearance as attorneys and counsellors for petitioner in Samuel Freshman, petitioner, v. W. S. Atkins, respondent.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK.

NOTICE TO RESPONDENT AND PROOF OF SERVICE.

The respondent, W. S. Atkins, is hereby notified that the petitioner, Samuel Freshman, will, on Monday, the 10th day of March, 1924, at the opening of court on that day, or as soon thereafter as counsel can be heard, submit to the Supreme Court of the United States, in the city of Washington, D. C., his certified petition for a writ of certiorari from that court to the United States Circuit Court of Appeals for the Fifth Circuit in cause No. 4136 on the docket of the said court, styled Samuel Freshman, appellant v. W. S. Atkins, appellee, and you are herewith delivered a copy of said petition for a writ of certiorari, and brief in support thereof.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Attorneys for Petitioner.

The foregoing notice is hereby accepted and delivery of a copy of said petition for a writ of certiorari and brief is hereby acknowledged on this, the 23rd day of February, 1924, at Dallas, Dallas County, Texas.

W. S. ATKINS,
Respondent, in person.

INDEX.

TABLE OF CASES, TEXTBOOKS AND STATUTES CITED.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1925.

No. 41.

SAMUEL FRESHMAN, Petitioner,

versus

W. S. ATKINS, Respondent.

BRIEF FOR PETITIONER.

Neither of the opinions of the courts below, so far as we have been able to learn, has been officially reported. The opinion of the district court is published as **In re Freshman,** 290 Fed. 609; the opinion of the circuit court of appeals is published as **Freshman v. Atkins,** 294 Fed. 867.

The order of the district court denying petitioner his discharge in part, was entered June 9, 1923 (R.15); motion for rehearing was overruled by the district court June

18, 1923 (R. 35). On appeal, the district court's orders were affirmed by judgment entered November 27, 1923 (R. 43), petition for rehearing being overruled by the circuit court of appeals on December 24, 1923 (R. 50). Petition for certiorari was granted by this court on April 7, 1924 (R. 51). The chief grounds asserted by petitioner in his petition therefor were summarized in the fly leaf to the petition, as follows:

THIS CASE INVOLVES

a construction of the Bankruptcy Act, section 14-b. Under this section of the act, three questions of public importance are erreoneously determined in the present case:

First. Is a bankrupt properly filing an application for discharge entitled of right to his full and complete discharge in the absence of appropriate objection and specification of objection by a party in interest and in the absence of any evidence in support thereof? Notwithstanding the statement by this court that he is, in **Bluthenthal v. Jones,** 208 U. S. 64, it has been held in the present case that he is not.

Second. May a bankrupt be denied a discharge as to debts scheduled in an earlier and still pending bankruptcy proceeding, solely on the ground of laches in failing to obtain a prompt determination of his still pending application for discharge in the earlier proceeding, laches not being one of the six offenses defined in the act for which grounds alone a discharge may be refused? Notwithstanding a line of cases to the contrary, the chief of which is **In re Glasberg,** 197 Fed. 896, decided by the second circuit court of appeals, in the present case it has been held that he may.

Third. May a district judge passing upon an application for discharge go beyond the record in the case before him on his own initiative, "investigate the merits of the application" and deny the application from con-

clusions so reached on a ground not pleaded in opposition? Notwithstanding the decision of the first circuit court of appeals to the contrary, **In re Marshall Paper Co.**, 102 Fed. 872, as well as the long line of decisions to the effect that one opposing a discharge must show by clear and convincing evidence that the bankrupt has committed one of the six defined offenses, it has been decided in the present case that he may.

STATEMENT OF THE CASE.

On November 14, 1922, petitioner was adjudged a bankrupt by order of the District Court of the United States for the Northern District of Texas at Dallas, he having but a few days theretofore filed a voluntary petition in bankruptcy. On February 18, 1923, he seasonably filed application for discharge (R.1). Though he had many creditors, all of whom were duly notified, notice of objection and specifications of objections to such application (R. 1, 2) were filed by only one person, respondent. Neither the objection nor the specifications referred to any other bankruptcy proceeding or order, or based any claim thereon. Petitioner filed exceptions and demurrers to such objection and specifications of objection (R. 3) which were overruled by the referee acting as special master on the question of discharge, to which petitioner excepted (R. 6).

A hearing was regularly had before the special master on April 27, 1923, of which all parties in interest were duly notified (R. 6), at which respondent was present in person, but not represented by attorney; at this hearing respondent proffered in support of his specifications a transcript of testimony of witnesses before a special master taken more than six years before in a bankruptcy proceeding in which petitioner had applied for a discharge (R. 6) and in which specifications had been filed by two creditors, one a cor-

poration meanwhile dissolved, and the other an individual meanwhile deceased (R. 12, 23). Petitioner's objections to the introduction of this in evidence being sustained by the master, respondent then stated that he had no evidence to proffer in support of his specifications and that he did not desire further time within which to procure witnesses or to employ attorneys, since he did not want to "send good money after bad" (R. 6).

The master then on his own motion interrogated petitioner, after which he dictated in open court in the presence of petitioner and respondent, findings that each specification was wholly unsupported by evidence and that evidence contrary to the averments in each specification was uncontradicted, together with a recommendation that the discharge as prayed for be granted (R. 11, 15). In this recommendation, the master referred to the former proceeding to which respondent had adverted, as pending before the district court (R. 11), recommending that the former proceeding be ignored because no claim or right thereunder had been asserted in any objection or specification, nor any reference made thereto, and because no final action had been taken therein. Neither respondent nor any other party in interest made any objection at that time or at any later time to the findings or recommendations; no party in interest has taken any further step in opposition to the discharge.

Such findings and recommendations were filed in the district court on June 7, 1923 (R. 6), and were presented the following day to the court by attorneys for petitioner, there being no appearance in opposition (R. 15). Thereupon the district court entered an order, on June 9, 1923, granting the discharge in part and denying the discharge in part, the denial being as to all creditors listed in the petition in bankruptcy filed by petitioner in the same court in Novem-

ber, 1915, the former proceeding referred to in the master's recommendation (R. 15). A written opinion of the district court was filed at the time of the entry of said order (R. 16), showing that its action was based, not upon any objection or specification, but upon judicial knowledge of the pendency and status of the earlier bankruptcy proceeding (R. 16, 17). The court on its own motion, on the basis of judicial notice only, and being expressly without actual knowledge (R. 16), determined that petitioner by laches in not obtaining a final determination of the long pending proceeding, in which the question of laches had not been raised by any party in interest, had disentitled himself to a discharge in that proceeding and that the question of discharge as to the debts scheduled in it, was therefore *res judicata* in the present case.

After announcement of this opinion, but on the same day, the district court inspected the record in the long pending proceeding and signed an order denying the discharge in that case, acting in so doing solely on the legal proposition that laches disentitled petitioner to a discharge therein (R. 18).

From the order entered in the present case, petitioner seasonably filed a motion for rehearing (R. 18) setting up the legal propositions here asserted (R. 19) and, in addition, facts with reference to the history and status of the other proceeding (R. 20, 33). On the hearing of such motion uncontradicted evidence was introduced by petitioner (R. 34) showing that petitioner had never occasioned any delay in such proceeding, that the objecting creditors therein had long since abandoned their objection and specification and in fact had long since been removed from the field of controversy by death and corporate dissolution, that no other party in interest had ever taken any part in

the proceeding, and that it at the time had not been finally determined, there then remaining undetermined therein a petition for rehearing. No other evidence was introduced (R. 34). The motion herein was overruled on June 18, 1923, and on the same day petitioner perfected his appeal to the fifth circuit court of appeals (R. 35). In that court the cause was heard on brief and oral argument for petitioner, there being no appearance for respondent (R. 40).

By judgment entered November 27, 1923 (R. 43), the action of the trial court was affirmed. The opinion of the court filed with such judgment (R. 40) did not refer to the propriety of denying a discharge on the ground of laches, particularly laches in another case in which the question had never been raised, or to the propriety of denying a discharge on any ground in the absence of appropriate pleading and proof in objection to the application for discharge, but the affirmance was based solely on the proposition that the action of the trial court was justified under the provisions of Section 14-b of the Bankruptcy Act authorizing the judge to "investigate the merits of the application". Since, however, the District Judge did not investigate the merits of petitioner's application, but relied upon laches as a ground for denial of the discharge and a ground for not investigating the merits of the pending application in either of the proceedings, the circuit court of appeals in effect necessarily approved the reasoning of the district court. Petition for rehearing (R. 43) was overruled on December 24, 1923 (R. 50). Petition for certiorari was filed herein, together with a certified copy of the record on February 26, 1924, and the writ of certiorari was granted on April 7, 1924 (R. 51).

The appeal below was based on the following errors of law of the district court (R. 36) which are assigned as

SPECIFICATION OF ERRORS.

1. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause numbered 1211 in bankruptcy, because the specifications of objection filed by the objecting creditor were and are fatally defective and insufficient to raise any issue for determination by the court, the bankrupt therefore being entitled of right to his discharge as prayed for.

2. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause numbered 1211 in bankruptcy, because the specifications of objection filed by the objecting creditor were and are wholly unsupported by any evidence.

3. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause numbered 1211 in bankruptcy, because the specifications of objection filed by the objecting creditor were abandoned and waived, as shown by the record of the proceedings had before the special master, by the absence of exception and objection to the findings and recommendations of the special master and by the absence of appearance in this court of the objecting creditor and of any attorney on his behalf.

4. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause numbered 1211 in bankruptcy, because no objection or specification of objection was filed in this cause by or on behalf of any creditor on the ground that, or averring that, the status of such proceedings numbered 1211 precluded or in

any way affected the granting of the discharge herein as prayed for.

5. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause numbered 1211 in bankruptcy, because there is no showing in this record that there has ever been a final determination in the earlier procedings numbered 1211, that the bankrupt is entitled or is not entitled to a discharge for any ground properly placed in issue in this cause, that is to say, such a final determination as may preclude or in any way affect the granting of a discharge herein as prayed for.

6. The court erred in overruling the motion of the bankrupt for a rehearing of the order denying the discharge in part and in not granting a discharge herein as prayed for on such rehearing, because the uncontroverted evidence proffered by the bankrupt on the hearing of such motion shows that there has been no final determination in the bankruptcy proceedings numbered 1211 in bankruptcy, whether this bankrupt is entitled or is not entitled to a discharge for any ground properly placed in issue in this cause, that is to say no final determination such as may preclude or in any way affect the granting of a discharge herein as prayed for.

POINT ONE.

Petitioner having properly filed an application for discharge, was and is entitled of right to his full and complete discharge in the absence of appropriate objection and specification of objection and in the absence of any evidence tendered in support thereof.

The record contains no objection or specification sufficient to raise an issue as to petitioner's discharge. Peti-

tioner's exceptions and demurrers to the objection and specifications of objection (R. 3) are sufficient, we think, to show this. No evidence supporting any of the specifications is to be found in the record. The findings of the master to this effect (R. 12, 13) have never been challenged. The district court recognized that there was no pleading or proof sufficient to raise an issue by basing its action solely upon judicial notice (R. 16). The circuit court of appeals so recognized, stating expressly in its opinion (R. 41):

> "It is true there was no appropriate pleading to present the issue and that no proof was formally tendered on the hearing. * * *"

The record shows consent to a discharge by all parties in interest. Respondent clearly expressed his abandonment of all opposition at the hearing before the master on April 27, 1923. None of the other parties at interest, though all were duly notified, filed any objection or specification of objection. All were also duly notified of the hearing before the master on April 27, 1923, but none appeared or objected to the findings and recommendations then announced, though they had ample opportunity to do so before the master filed his findings and recommendations in the district court on June 7, 1923. All other parties in interest charged with knowledge of the hearing of April 27th as they were, acquiesced in the abandonment of all opposition to the discharge, having intentionally remained away and refrained from objecting at any stage of the proceeding. The withdrawal of the only objection and specifications of objection, which were in themselves insufficient in law, prior to the introduction of any evidence, and therefore before any party in interest acquired, or could acquire any benefit by representation, made the situation the

same as if no objection or specification of objection had ever been filed. Especially is this true since each party in interest placed himself in the position, by his own conduct, of consenting to the presentation of the application for discharge without opposition.

In this state of the record petitioner was entitled of right on presentation of the matter to the district court to his discharge as prayed for. The Bankruptcy Act, section 14-b, provides:

> "The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless * * * (he has committed one of six defined offenses)."

From a reading of this statute alone, it clearly appears that the present bankruptcy act entitles the bankrupt to his discharge upon appropriate application, of right, unless he be shown to have committed one of the six defined offenses. By the very form of the law the debtor is discharged, subject only to exceptions which must be established by one, entitled to object, who has filed appropriate objection. The wording of this section is not dissimilar to the words employed in section 17-a (3), considered by this court in **Hill v. Smith**, 260 U. S. 592, wherein an "unless" phrase was held by this court to create an exception, pursuant to which one, if he would bring himself within it, must offer evidence. The language of Mr. Justice Holmes seems equally applicable here:

> "By the very form of the law the debtor is discharged subject to an exception, and one who would bring himself within the exception must offer evidence to do so." 260 U. S. 595.

This court has so construed the statute. It has inferentially done so in promulgating its General Orders and Official Forms, in providing in General Order 32 immediately after the provision relating to the application for discharge:

> "A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file his specification in writing on the grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge."

This order entitled "Opposition to Discharge or Composition" purports to be the exclusive method of opposing an application for discharge; the prescribed manner of opposing is under form 58, which clearly contemplates specifications of objection by parties in interest only; limitations are thus placed upon oppositions, it being inferentially provided that failure to comply with the provisions of the order shall entitle the bankrupt to a discharge, if appropriately applied for.

This court has expressly so construed the statute. In **Bluthenthal v. Jones,** 208 U. S. 64, it was unanimously held that a discharge granted in a second bankruptcy proceeding was valid and binding on creditors in both proceedings notwithstanding a denial of the discharge in the first proceeding, the order granting the discharge being held to be proper in the absence of an affirmative pleading of *res judicata.* The opinion of Mr. Justice Moody, rendered in 1908, states:

> "Section 14 of the amended act, which was applicable to the second proceedings, provides that after due hearing the court shall discharge the bankrupt, unless

he has committed one of the six acts specified in that section. * * * Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy, finally determines for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced. Plaintiffs in error failed to do this. When an application was made by the bankrupt in the district court for the Southern District of Florida, the judge of that court was, by the terms of the statute, bound to grant it, unless upon investigation it appeared that the bankrupt had committed one of the six offenses which are specified in section 14 of the bankruptcy act as amended. An objecting creditor might have proved upon that application that the bankrupt had committted one of the acts which barred his discharge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved it would have taken the place of other evidence and have been final upon the parties to it. But nothing of this kind took place. Bluthenthal & Bickart intentionally remained away from the court and allowed the discharge to be granted without objection. Since the debt due to the plaintiffs in error was a debt provable in the proceedings before the District Court of Florida and was not one of the debts exempted by the statute from the operation of the discharge, it was barred by that discharge." 208 U. S. 64, 66.

This construction of the statute requiring the district judge on appropriate application for discharge and in the

absence of opposition thereto, to grant the discharge, has been uniformly followed by the lower courts. Excerpts from a few of their decisions to this effect are sufficient:

"When the bankrupt files his petition for a discharge, the only facts pleadable in opposition thereto are those which show that, under the provision of section 14, he is not entitled to a discharge. In other words, it must be shown that he has committed some one of the offenses described; otherwise the judge 'shall' discharge the applicant." **In re Marshall Paper Co.**, 102 Fed. 872, 874, 1st C. C. A. Mass., 1900.

"Under section 14 of the bankruptcy act, the bankrupt is entitled to a discharge, on due application, unless guilty of one of the offenses there specified, and the objector has the burden of proof upon such issue. The question whether the grounds for denying a discharge are wisely so limited cannot enter into consideration when an issue is raised, and the terms of the act are plain that the application is deniable only upon due proof of commission of one of these enumerated offenses." **In re Eades**, 143 Fed. 293, 294, 7th C. C. A. Ill., 1905.

"The bankrupt was entitled to his discharge as a matter of right, unless debarred upon one of the satutory grounds specified by the creditor." **In re McCrea**, 161 Fed. 246, 247, 2nd C. C. A. N. Y., 1908.

"The provisions of the bankruptcy act compel the conclusion that it is the will of Congress that bankrupts be discharged unless objections based upon the specific grounds set forth in the acts of Congress are made good." **In re Johnson**, 215 Fed. 748, 750, D. C. Pa., 1914.

"But a discharge under the present act is a legal right, unless some objection be filed and affirmatively sustained, for reasons specifically enumerated in section 14 of the statute, and not otherwise." **In re Kaufman**, 239 Fed. 305, 306, 2nd C. C. A. Conn., 1917.

"Discharge is a statutory matter. The court, as well as the objecting creditors, is confined to the specifi-

cations of objection." **In re Newmark**, 249 Fed. 341, 342, 2nd C. C. A., N. Y., 1918.

"As a discharge operates merely to extinguish creditors' claims, no one other than a creditor can be a party in interest. Under well recognized rules of pleadings, strangers to the proceeding cannot be heard to object. This theory finds support in the statute. * * * The right of the trustee to file objections is further limited by a later clause in the same subdivision. * * * This conclusion is further confirmed by an examination of rule 32 of the General Orders in Bankruptcy announced by the Supreme Court and which we think inferentially limits the right to file objections to creditors. The foregoing citations would seem to deny to referees the right to interpose objections to discharges, as well as clearly recognizing the right of a bankrupt to a discharge, except in those cases where objections are filed and after full hearing the court determines that one of the six specified grounds for refusing a discharge exists. * * * Nor should the court on its own motion interpose objections to the discharge; for courts do not create issues. They sit to try and determine them upon presentation of the evidence by the parties interested. We conclude that in all applications seasonably made, where no objections are filed, the discharges should follow as a matter of right." **In re Walsh**, 256 Fed. 653, 7th C. C. A. Wis. 1919.

"Discharge and objection are statutory. The bankrupt is entitled to discharge, unless the objection comes within the statute. It does not in the instant case. The objection is overruled, and discharge is granted. **In re Plank**, 289 Fed. 900, D. C. Mont., 1923.

Courts of bankruptcy throughout the country have been construing the statute uniformly to this effect in their everyday practice. Repeatedly the question of law has been raised, whether the one filing an objection was entitled to oppose the discharge, and courts have always passed on

this question as if controlling on whether a discharge should be granted, and have assumed in consonance with their everyday practice that if the objection or specifications were not appropriately filed, the bankrupt was entitled of right to his discharge; the most recent case wherein both the district court and the appellate court assumed this without discussion, is **In re Feuer**, 4 Fed. (2nd) 892, 2nd C. C. A. Conn., 1925. Similarly, questions have repeatedly been raised whether the objections or specifications of objection were filed in proper time, and it has repeatedly been held that, if not, the objection or specification should be ignored and the bankrupt be given his discharge the same as if it had not been filed; an illustration of this accepted practice is **In re C. H. Kendrick & Co.**, 226 Fed. 890, D. C. Vt., 1915. Similarly, courts have consistently required that the specifications be, as their term implies, specific and definite to the end that the bankrupt may know in detail the charges made which, if established, would result in the denial of his discharge, and have stricken specifications not meeting such requirements and thereupon, unless other specifications be appropriately filed, have granted the discharge as if no specifications had been filed; cases illustrating this general practice are:

In re Phillips, 298 Fed. 135, D. C. Oh., 1924;
In re Slatkin, 286 Fed. 242, D. C. Mich., 1923.

Moreover, when specifications have been duly filed by one entitled to prosecute the opposition, the courts have further required that the charges thus specified be established by evidence offered by a party in interest opposing the discharge. It has been uniformly held, and there are a great many cases on this point, that the burden of proof rests upon the creditors; one or more decisions to this effect have been rendered by each of the circuit courts of appeals; de-

cisions to this effect by the circuit court of appeals which decided this case are:

Humphries v. Nalley, 269 Fed. 607, 5th C. C. A. Ga., 1920;

Garry v. Jefferson Bank, 186 Fed. 461, 5th C. C. A. Ala., 1911;

Hardie v. Swofford Bros. Dry Goods Co., 165 Fed 588, 5th C. C. A. Tex., 1908.

Reported decisions evidencing the practice of courts of bankruptcy in the particulars mentioned are numerous; but of course unreported decisions, made almost daily by district judges and by referees, wholly consistent with the principles stated, are legion.

To what purpose shall it be held that only persons designated by the statute may oppose the application for discharge, that they may oppose it only by specific pleading filed within a definite time, and that upon so tendering an issue they must establish their allegations before the discharge may be denied, if a court, in the absence of any or all of these requirements, may on its own initiative in absence of opposition deny the discharge? The affirmance of the present case by this court must involve, therefore, the overturning of these several consistent lines of decisions long established and uniformly followed and consequently would effect a revolution in the practice of courts of bankruptcy on applications for discharge.

The decisions of the lower courts in the present case afford the only illustrations which we have been able to discover under the present act where this overwhelming weight of authority and this commonly accepted practice have been ignored. The opinion of neither of the lower courts in the present case cites any authority which supports its conclusion, the opinion of the circuit court of appeals (R. 40) being devoid of citation, and the opinion of

the district court (R. 16) citing a large number of cases on the definition of *res judicata* in each of which a proper party in interest had appropriately filed specification of objection to the discharge, and had proffered in support of such pleading a court record to evidence and establish *res judicata.*

The history and purposes of bankruptcy legislation demonstrate that this currently accepted practice of discharging a bankrupt of right in the absence of specified objection, should be followed by this court in its disposition of the present case. Each of the successive acts of bankruptcy passed by Congress has been more liberal than its predecessor with reference to discharges, and a comparison of them clearly shows the intent of Congress expressed in its phrasing of section 14-b. The original act of 1800, 2 Stat. L. 19, secs. 34 and 36, permitted a discharge only in cases where dividends to creditors of 75 per cent were possible, and then only if the commissioner should certify to his opinion that there had been a full disclosure of all assets and full performance of all duties of the bankrupt under the statute, and then only if two-thirds of the creditors in number and in value should consent thereto in writing. The strict provisions of this statute in this and other particulars, as against bankrupts, was a cause for its early repeal and the remaining popular disapproval of bankruptcy legislation lasting for many years. The act of 1841, equally short-lived, was more lenient in its provision, 5 Stat. L. 440, sec. 4, that every bankrupt who complied with the obligations imposed by the statute should be entitled to a full discharge unless a majority in number and value of his creditors filed their written dissent thereto, provided, however, that any creditor or other person in interest might appear and contest such right of the bankrupt to his discharge by showing

one of a number of specific violations of the statute. Under this act, as had not been true under the earlier act, creditors were first recognized as exclusively concerned in the question of the discharge, it being held that in the absence of written dissent by the majority of creditors, a specific creditor had to plead and prove a specific ground for a refusal of the discharge: **In re Banks**, Fed. Case No. 958, D. C. N. Y., 1843.

The act of 1867 was yet more liberal, the provision permitting a number of creditors to prevent a discharge by mere dissent for such reasons as to them might be sufficient, being omitted. 14 Stat. L. 531. The pertinent provisions of this act, secs. 29, 31 and 32, were:

> "No discharge shall be granted, or if granted, be valid—if * * * (bankrupt committed any of 17 defined offenses).
>
> And be it further enacted that any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion order any question of fact so presented to be tried at a stated session of the district court.
>
> And be it further enacted that if it shall appear to the court that the bankrupt has in all things conformed to his duty under this act, and that he is entitled under the provisions thereof, to receive a discharge, the court shall grant him a discharge. * * *"

Under the provisions quoted, the question whether a court in the absence of opposition by a creditor might refuse a discharge, was not one clearly determinable by the mere form of the law, for the law required that conformity by the bankrupt to his duties should appear to the court, and that no discharge should be granted "if" any of the named offenses were committed. Nevertheless, it was repeatedly held under this statute that unless there were proper specifi-

cations of objection, and evidence establishing the commission of one of the defined offenses, the bankrupt should be granted his discharge, the burden of proof resting upon the objecting creditors. Moreover, it was expressly held, **In re Antisdel**, Fed. Case No. 490, D. C. Mich., 1878, that in the absence of such appropriate pleading and proof by a creditor, the court had no right to consider any question as to the discharge, but was bound to grant it as of right; the single case to the contrary theretofore decided was expressly disapproved, the court saying:

> "The better opinion seems to be, that creditors who have been duly notified and make no opposition, are regarded as consenting to a discharge; and that the court will only consider whether the bankrupt has committed an act which would bar a discharge, upon specifications regularly filed in opposition thereto (citing cases). The books are full of cases holding that the specifications must not be vague and general, but distinct, precise and specific and so framed as to advise the bankrupt what facts he must be prepared to meet and resist (citing cases). But of what use all this particularity in framing an issue, if the court may disregard the issue thus framed, and refuse a discharge *mero motu* if it appears that the bankrupt has committed any other act not covered by the specifications?"

Thus the prevailing practice under the previous acts with which Congress was familiar in 1898 when the present act was before it for consideration, involved an immediate discharge of the bankrupt, as a matter of right, if no creditor opposed his discharge. At this time, so far different from earlier days, there was a popular demand for a bankruptcy law for the relief of honest and unfortunate debtors crushed by the panic of 1893, and the difficulties of ensuing years. As Mr. Remington has stated:

> "When Congress passed the law of 1898 the people in general little comprehended the magnitude of the

work done. Its passage was secured chiefly because of its one feature, the release of debts. A great multitude of victims of years of industrial depression were lying stranded on the rocks of hopeless debt. These debtors were skulking along the streets hardly daring to lift their eyes to passers-by lest they might remind some creditor of an almost forgotten if not forgiven debt. Either so or the debtor was doing business under the name of his wife or other relative, or as 'agent' or 'trustee' as he would variously style himself; everybody understanding the real situation except perhaps the courts themselves, whose rules of evidence obliged them often times to find that an experienced business man was merely an agent or trustee for a wife who owned nothing originally and hardly knew where the place she was now made to say she owned was located, and generally knew nothing in particular about it. This was the natural result of the barbarism of a country that had no bankruptcy system, and these debtors living their lives of falsehood and pretense were the legitimate fruits of lack of civilization. These were probably the most potent arguments in securing the passage of the present bankruptcy act; but after all the scope of the work was infinitely broader." I Remington on Bankruptcy, 3rd ed., p. 19.

That this matter of discharges was one of the things with which the drafter of the original bill was chiefly concerned, is shown by the care with which section 13 (now section 14 of the act) as originally introduced, was drawn: 31 Cong. Rec. pp. 2039, 7205. In order to make certain that the discharge should follow as a matter of right in the absence of opposition, apparently, the negative statement of the Act of 1867 that no discharge should be granted "if—", was transformed to a positive statement to which a mandate to the trial judge was added—"the judge shall * * * discharge the applicant unless—". The seventeen defined offenses in the Act of 1867 were reduced in the bill as originally intro-

duced to nine, and after repeated amendment prior to passage there remained on enactment of the law only two offenses upon proof of which a discharge might be denied: 30 Stat. L. 550. In view of this legislative history, the language of section 14-b, clear on its face, renders indisputable the proposition that the bankrupt must be given his discharge in the absence of appropriate opposition by creditors as specifically provided for in the act.

By amendments to the Bankruptcy Act passed by Congress since 1898, Congress has clearly demonstrated its intent that this right to a discharge in the absence of opposition by creditors shall continue. By amendment of section 14 of the Act, in 1903, 32 Stat. L. 797, four additional offenses were added, proof of which on appropriate objection should justify a refusal of a discharge; the identical language, however, which so clearly shows that in the absence of such proof discharge should be granted, was re-enacted. This was true also of the amendment of 1910, there being added a provision to the section by this amendment that the trustee might interpose objections, providing he should be authorized to do so by a meeting of the creditors: 36 Stat. L. 840. By this amendment also, section 58 was amended, giving creditors thirty days notice of application for discharge instead of the ten-day notice theretofore provided. In this legislation of 1910, Congress showed even more clearly than before its intention that the creditors should determine whether any objection to the discharge should be filed, and that in the absence of any action by creditors in filing objection themselves, or in authorizing the trustee to do so, the discharge should be granted of right. Congress could not say more clearly that creditors exclusively shall determine whether there shall be any issue raised or whether the discharge shall be granted without opposition.

Were there any possible doubt as to the intent of Congress, this court should indulge every presumption to support the current bankruptcy practice, for it is consistent with our fundamental concepts of litigation, whereas any other rule permitting a court to deny a discharge in the absence of opposition would violate principles of Anglo-Saxon law which we have so cherished that many of them have been written into our Bill of Rights. A person charged with commission of an offense justifying a denial of his discharge should be held secure, in bankruptcy proceedings as certainly as in criminal prosecutions governed by the provisions of the Sixth Amendment to the Constitution, in his right to be informed, specifically and in writing filed as a part of the proceeding, of the nature and cause of the accusation; to be confronted in open court with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

To permit a judge to become an objecting party in interest, is to permit him to disqualify himself from the traditional functions of a court and to grant him an unbounded discretion. An order denying a discharge is, in effect, not appealable if such an order is not reversed when the record shows no pleading and no evidence of the commission of any offense.

Though he was then speaking of the provision of the Bankruptcy Act relating to adjudications in involuntary proceedings, the language of Mr. Justice Sanford is equally applicable here:

> "Such a proceeding, as any other litigated matter, requires adversary parties; and manifestly, in the very nature of things, can only be continued as long as there are adversary parties." **Meek v. Centre County Co.**, 264 U. S. 499, 503.

POINT TWO.

There being no pleading and no proof thereof, the district court erred in denying the discharge in part because of the status of another bankruptcy proceeding, especially since the status of such other proceeding was such as not to justify a court in taking judicial notice as a basis for denying the discharge, on its own initiative and in the absence of any opposition by any party in interest.

At the time of the presentation of the record of proceedings before the master to the district court, including the findings and recommendations of the master, there was no opposition on the part of any party in interest to the granting of the discharge to the bankrupt. There had been an objection and specification of objection filed by respondent which had been abandoned by all parties in interest; this opposition did not plead as a bar to the discharge or even refer to any other bankruptcy proceeding, and in fact did not appropriately plead any ground for opposition and hence no evidence on the issue of discharge was admissible. No evidence relating to such other proceeding was proffered by any party in interest other than the proffer by respondent at the hearing before the master of the stenographic report of the testimony of witnesses given more than six years before in the other proceeding, which proffered evidence was excluded from the record by the master, respondent then stating that he had no evidence to proffer. As above detailed, there was and is no opposition to the discharge in this proceeding by any party in interest, either by pleading or by proof.

If, contrary to all authorities on the question, it is ever proper for a court of bankruptcy to consider evidence on the question whether a discharge appropriately applied for should be granted when there is no pleading in opposition

and no evidence offered by any party in interest, it would seem clear that the court should not go further than to examine witnesses and to introduce documentary evidence, subject to a cross-examination of the witnesses by the bankrupt, an explanation of the documentary evidence, if possible, and the introduction of other evidence in rebuttal. Such a proceeding, for example was that which the master in the present case adopted in examining the bankrupt on his own motion without objection by the bankrupt (R-7). Even such procedure is improper, since the hearing is held without giving to the bankrupt the opportunity to produce witnesses, which he would have if proper specifications were filed in advance of the hearing and since it renders the judge or master a party litigant rather than a court.

But to go beyond such procedure, as the district judge did in the present case, violates much further the fundamental rights of the bankrupt; for the district judge, after a hearing has been held by the master for the introduction of all evidence on the subject, without notice being given to the bankrupt that further evidence might be introduced against him or be treated by the court as if introduced and in the absence of opposition by any party in interest, to consider as if in evidence either testimony of witnesses or documentary evidence, including court records, denied the bankrupt an opportunity to explain or rebut the evidence considered.

For the same reason that such action by the district court was erroneous, courts have uniformly held, not only in bankruptcy matters but generally, that *res judicata* when relied on as a defense in bar must be specifically pleaded and then established by evidence regularly introduced. If *res judicata* be relied on not as a complete bar but to establish conclusively an issue of defense, the generally ac-

cepted rule, equally applicable to bankruptcy law, is that though the order or judgment relied upon need not be specifically pleaded any more than any other documentary evidence, nevertheless the ultimate issue which is sought to be established by virtue of it must be appropriately pleaded and the order or judgment must be appropriately proffered in evidence. **Southern Pacific R. R. Co. v. U. S.**, 168 U. S. 1, 57. Within one of these two rules, every case of *res judicata* falls; and in one sense or the other it is true that in every case, *res judicata* must be pleaded and proved.

Is a final order denying a discharge in some other proceeding relied upon by a party in interest as a complete bar to the consideration of the application? Following the general rule, it seems clear that if so, the party in interest must specifically plead the final order relied upon:

United States v. Bliss, 172 U. S. 321, 1898;
Graff Furnace Co. v. Scranton Coal Co., 266 Fed., 798, 801; 3rd C. C. A., Pa., 1920;
In re Youtsey, 260 Fed. 423, 433, D. C. Oh. 1916.

There is no reason why this general rule requiring a specific pleading of a final order or judgment before it may be considered in evidence as a bar on the theory of *res judicata*, should not apply to bankruptcy law. Courts have uniformly applied the rule to discharged bankrupts, requiring that they specifically plead and prove their discharge, failing in which judgment may be rendered against them on a discharged debt. The reason for this was well stated by Mr. Justice Miller, in speaking for this court:

> "We are of opinion that, having in his hands a good defense at the time judgment was rendered against him, namely, the order of discharge, and having failed to present it to a court which had jurisdiction of his case, and of all the defenses which he might have made, including this, the judgment is a valid judgment, and that

the defense cannot be set up here in an action on that judgment." **Dimock v. Revere Copper Co.**, 117 U. S. 559, 566.

This court has recently referred to the matter again and has expressed the general rule:

> "The order of confirmation (of a composition) becomes in effect a discharge and is pleaded in bar with like effect." **Cumberland Glass Co. v. DeWitt & Co.**, 237 U. S. 447, 452.

If a discharged bankrupt must plead his discharge in bar, an opposing creditor who has successfully secured a denial of a discharge, should be required to plead the final order of denial in bar. The order denying a discharge is not of greater dignity or force than the order granting a discharge. Each order is one that determines, as its ultimate issue between the bankrupt and the creditor, whether the debt shall be enforceable.

So far as shown by reported decisions, with the exception of the two opinions in the present case, bankruptcy courts have uniformly so held, there having been in each of the cases in which an objection to discharge on the ground of *res judicata* has been sustained, a specific pleading of the order denying the discharge or of the equivalent failure of the bankrupt to apply for a discharge within the statutory period. Of the many cases to this effect illustrating this commonly accepted practice of specifically pleading the previous proceeding, it is sufficient to refer to **Bacon v. Buffalo Cold Storage Co.**, 193 Fed. 34, 5th C. C. A. Tex., 1912. It is to be noted that in that case the same judge who wrote the opinion for the circuit court of appeals in the present case, after quoting from the opinion in Bluthenthal v. Jones, as have we, said:

> "From this it appears to be required that the granting of the discharge under a second petition be resisted

by objecting creditors having claims provable under a first petition."

This court denied a writ of certiorari in that case, 225 U. S. 701.

We submit that this accepted practice of requiring a specific plea of the former discharge proceeding is commendable, since it assures that the bankrupt shall have an opportunity to know in advance of the hearing the specific contentions of his opposing creditors as the General Orders, promulgated by this court, contemplate.

Perhaps, however, as suggested by Mr. Justice Moody, it is sufficient for an objecting party in interest to plead only the ultimate fact, the commission by the bankrupt of one of the six offences defined in the act and then on the hearing to offer in support of his allegation an order denying the bankrupt a discharge from the debts in question on account of his commission of the alleged offence. Quoting again the language of Mr. Justice Moody:

> "If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced * * *. An objecting creditor might have proved upon that application that the bankrupt had committed one of the acts which barred his discharge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved, it would have taken the place of other evidence and have been final upon the parties to it." **Bluthenthal v. Jones**, 208 U. S. 64, 66.

If this practice meets the approval of this court, and it is therefore, unnecesary that the previous bankruptcy

order be specifically referred to, in the specification of objection, nevertheless it is essential, prior to the introduction in evidence of such record, that there be appropriate specification of objection to which the record of the previous proceeding shall be relevant. When there is presented to the bankruptcy court no specification of objection, as in effect there was none in the present case, it necessarily follows that the record in the earlier proceeding is not admissible in evidence, even if offered by a party in interest. Under such circumstances, as in the present case, the bankruptcy court is "bound to grant" the discharge as applied for, as Mr. Justice Moody stated, not only because of the specific provision of section 14-b to that effect, but also because of the absence of pleading justifying the consideration in evidence of any record in the former proceeding.

In the absence, therefore, of specific pleading setting up as *res judicata* the proceedings in the other bankruptcy case, and in the absence of the introduction in evidence of such records to support the appropriate specification of one of the six offences defined in the act, it was error for the district court to deny the discharge because of the status of the other proceeding. The decision of this court in **United States v. Bliss,** 172 U. S. 321, is directly in point to this effect. On appeal by the United States from a judgment rendered by the court of claims, this court held that the record of evidence did not justify the recovery. There had been attached to the record, however, a stipulation signed by attorneys for both parties, agreeing to the correctness of an attached record of another case between the same parties in the same court, containing findings of fact and a judgment for petitioner from which no appeal had been taken and the time for taking an appeal had expired;

it was contended that the findings of fact and the judgment with which the court of claims was familiar as part of its records, established the right of petitioner to the recovery. This court unanimously overruled this contention, it being stated in the opinion of Mr. Justice Brewer:

> "Upon this the doctrine of *res judicata* is invoked to uphold the judgment. A sufficient answer is that neither by pleading nor evidence were the proceedings in this other case brought before the Court of Claims in the present suit. If a party neither pleads nor proves what has been decided by a court of competent jurisdiction in some other case between himself and his antagonist, he cannot insist upon the benefit of *res judicata*, and this although such prior judgment may have been rendered by the same court." 172 U. S. 321, 326.

It was a holding necessary to this result that the court of claims erred in rendering judgment based on such former record when there was neither pleading nor evidence to support it, for if it had been proper for the court of claims to take judicial notice of such former record, it would have been presumed in support of its judgment that such proper judicial notice had been taken.

So, in the absence in the present case of pleading and proof of the status of the other bankruptcy proceeding, it was error for the district court to take judicial notice thereof. There was no occasion for judicial notice. Issues not raised by the parties, may not be raised by the court. This court has repeatedly so held, a leading case citing other decisions by this court to this effect, being **Mutual Life Insurance Co. v. McGrew**, 188 U. S. 291, in which Mr. Chief Justice Fuller, speaking for this court, stated:

> "Nor can this failure to claim under the treaty be supplied by judicial knowledge. We so held in Mountain View Mining & Milling Co. v. McFadden, 180 U. S.

533, where we ruled that judicial knowledge could not be resorted to to raise controversies not presented by the record; and Professor Thayer's Treatise on Evidence was cited, in which, referring to certain cases relating to the pleadings and matters of record it was said 'that the right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them.' Arkansas v. Kansas & Texas Coal Co., 183 U. S. 185, 190. That rule must necessarily govern us in passing on the question of our appellate jurisdiction under section 709." 188 U. S. 291, 312.

If there is no pleading rendering admissible in evidence an order or judgment as *res judicata*, it is improper for a court to take judicial notice of it.

Moreover, if there is such pleading, judicial notice should not be taken of proceedings in any other case, even if between the same parties, involving the same issues, before the same judge; for it is the duty of parties to introduce such part of the records of other proceedings, as will establish their allegations of *res judicata*, and the court should not assume the attitude of a partisan in selecting such parts of a record and in giving effect thereto. If a party does not offer in evidence the parts of the record relied upon, and the court considers, without such offer, the former proceedings in evidence to the same effect as if formally introduced, his adversary does not have adequate opportunity to challenge the relevancy of the record or to explain or rebut that of which judicial notice is taken. For these reasons it is held, according to the decided weight of authority, that judicial notice of proceedings in another case will not be taken though relevant to an issue made by the pleadings, and even though the other

case be in the same court, between the same parties and involving the same issues raised:

Murphy v. Citizens Bank, 100 S. W. 894, Sup. Ct. Ark., 1907;

Pacific Iron & Steel Works v. Goerig, 104 Pac. 151, Sup. Ct. Wash., 1909;

Pickens v. Coal River Co., 65 S. E. 865, Sup. Ct. App., W. Va., 1909;

Matthews v. Matthews, 77 Atl. 249, Ct. App. Md., 1910;

Ollschlager's Estate, 89 Pac. 1049, Sup. Ct., Ore., 1907;

If the reasoning of these cases be accepted, it follows the more clearly that where there is no pleading of the same issue, and especially where there is no issue raised by the pleading at all, judicial notice should not be taken. For judicial notice functions to give a court facts relevant to issues raised by the parties, not otherwise in evidence; it is in lieu of evidence and is subject to the same restriction as all other evidence, that it should not be considered unless relevant to an issue raised by the pleadings.

Even in cases in which judicial notice may properly be indulged, its exercise is a matter of discretion. As stated in the excerpt quoted from the opinion of Mr. Justice Moody, it is not the duty of a court to search the records in other cases, and according to the quotation from the opinion of Mr. Justice Brewer, this is equally true though the prior proceeding be in the same court. Professor James B. Thayer, whom this court has frequently recognized as an authority on the law of evidence, has said:

> "Courts may judicially notice much which they cannot be required to notice. * * * This function is indeed a delicate one; if it is too loosely or ignorantly exercised, it may annul the principles of evidence, and even of substantive law." Thayer, Preliminary Treatise on Evidence at the Common Law, p. 309.

Such a discretion, it is well recognized, should be exercised for the promotion of justice and the courts should refuse to take judicial notice where its invocation will result in an unfair or improper result.

> "Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends upon the nature of the subject, the issue involved and the apparent justice of the case." **Hunter v. N. Y. O. & W. Ry. Co.**, 116 N. Y. 615; quoted and followed in **City of St. Louis v. Niehaus**, 236 Mo. 8.

For three reasons the district court should not have exercised such a discretion, if it had any authority to take judicial notice of the prior bankruptcy proceeding in the absence of any pleading opposing the discharge in the present case; first, the matter of discharge had not been finally determined in the proceeding of which judicial notice was taken; secondly, the conclusion of the district judge that the bankrupt had disentitled himself to a discharge therein by laches, was erroneous as a matter of law and fact; thirdly, the denial of the discharge in that case, as in the present case, would effect an injustice to petitioner.

In the first place, an order denying discharge is final in the sense that it is appealable and is not deprived of that finality by the filing of a motion thereafter. By the weight of authority it is held, however, that such an order is not a proper predicate for pleading and proof of *res judicata*, unless it also be shown that appeal therefrom has been disposed of or cannot be taken, for unless that is shown, the issue is not shown to have been determined between the parties. To sustain a plea of *res judicata* on proof of an order or judgment in an earlier proceeding from which an appeal is shown to be pending, or a motion which may serve

as a predicate for an appeal, is erroneous according to the weight of authority:

Texas Trunk Ry. Co. v. Jackson Bros., 85 Tex. 605, 1893;
Blue Goose Mining Co. v. Northern Light Mining Co., 245 Fed. 727, 9th C. C. A. Cal. 1917.

Such is shown to be the status of the bankruptcy proceeding of which the district court took judicial notice in the present case; an order denying the discharge was entered, but a motion for rehearing which had not been acted upon was still pending at the time the trial court acted in the present case (R. 34), in overruling petitioner's motion for rehearing herein. It is to be noted that the pendency of such motion in the other proceeding was urged as a ground for petitioner's motion for rehearing herein and that the motion in this case was overruled, but not the motion in the other proceeding. The district judge had control of the cases on his docket; in permitting the present case to be submitted to him first, in overruling the motion for rehearing herein while the motion in the other case remained pending and in permitting such motion to remain pending during the prosecution of this case on appeal, the district judge evidenced a desire that the question of law on which he acted in the other proceeding, as shown by his opinion herein, be tested by appeal of the present case. The matter of discharge in the other proceeding is not shown by the record to have been determined against petitioner, with that finality justifying a denial of a discharge herein solely on that ground.

Secondly, the court in its opinion herein clearly shows that the denial of the discharge in the other proceeding is on the ground of laches and on that ground alone. The laches in the earlier proceeding is referred to by the district judge as the sole ground for denial of the discharge in the

present case. This question of laches was not raised by any party in interest in the other proceeding (R. 32), or in this proceeding.

This action of the district judge was erroneous, because laches is not a ground for denial of a discharge. The bankruptcy act specifies six grounds for which a discharge may be denied, and these grounds have been uniformly held to be exclusive. Laches, not being one of them, will not justify an order denying a discharge. The leading case to this effect is **In re Glasberg**, 197 Fed. 896, 2nd C. C. A. N. Y., 1912, wherein a motion of an objecting creditor to dismiss the application for discharge on the ground of laches was held to have been improperly granted by the district court; it was said in the opinion:

> "Delay in bringing on the hearing is not a ground for refusing a discharge found in the act. It specifically enumerates what the grounds are and this is not one of them." 197 Fed. 896, 897.

To the same effect, it has been held:

> "Laches of the bankrupt in not bringing on a trial of the issues raised by a creditor's opposition to his application for discharge is not one of the enumerated causes and the court is not authorized to extend the provisions of that section and refuse a discharge upon any other grounds than those therein set forth." **In re Wolff**, 132 Fed. 396, 397, D. C. Cal., 1904.
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> "It will be observed that the language of section 14-b is directed wholly to the judge and not to the bankrupt and is mandatory in its terms. * * * To dismiss this application unheard would be simply to fly in the face of this mandate. The fact that from some unknown cause the hearing was not had seasonably will not warrant the judge in refusing to hear at all, in declining to investigate the merits of the application, or to discharge the applicant. It would be to amend the statute and add

another specification to the grounds for refusing a discharge, to penalize a want of diligence in pressing for a hearing as heavily as the commission of the crimes and frauds mentioned in the section. A bankruptcy case is one in equity. The extreme penalty for negligence in failing to press for a trial as fixed by Equity Rule 57, is dismissal without prejudice; but a dismissal of this application would be to bar a discharge entirely, for a new application could not now be filed in this case, nor could these debts be discharged even by another bankruptcy." **In re Neal**, 270 Fed. 289, 290, D. C. Ga., 1921.

The reasoning of these decisions is consistent with the line of decisions placing the burden of proving the specifications of objection on the objecting creditors. For from the time of filing specifications of objection, the burden of proof rests upon the creditors, and not upon the bankrupt, and the bankrupt not being the proponent of the issue raised, has no duty to see that the issue is presented to the court.

The district court could not, therefore, because of delay in the earlier proceeding, deny petitioner his discharge therein; more clearly is it true that in the present case the district court could not treat the earlier case as a basis for *res judicata*, when it is considered that the question of laches was raised by the court in each proceeding on its own motion and determined on the basis of judicial notice only.

If delay were a possible ground for denying a discharge, certainly the delay should be explainable, and a bankrupt should, after having been given the notice to which he is entitled by pleading filed before a hearing, have the opportunity in open court to examine and cross-examine witnesses, to explain the delay and to rebut any presumption that might appear from a prima facie showing of neglect. The action of the district court in taking judicial notice of the

delay deprived the bankrupt of these rights and involved a judicial notice, not merely of the facts shown by the record in the other proceeding, but of facts not a part of such record, namely, that the causes for the delay did not and could not justify it. If a court has a discretion to consider by judicial notice the status of another proceeding in bankruptcy, though an application for discharge pending before it is without opposition, the exercise of the discretion to deny a discharge in one case because of an unalleged and unproved laches in another case, is unjust and should not meet the approval of this court.

Finally, if the district court could look to the facts of record relating to the other proceeding, to determine whether in its discretion judicial notice of such other proceeding should be taken, this court must necessarily look to the same record of proceedings to determine whether that discretion was properly exercised. To this end all of the relevant facts with reference to the other proceeding are shown in the present record by uncontradicted evidence introduced on petitioner's motion for rehearing herein (R. 34). This uncontradicted evidence clearly shows, we submit, that petitioner is entitled in justice to his discharge. The only specification of objection in the long pending proceeding (R. 32) was that the bankrupt failed to keep books of account or records with intent to conceal his true financial condition, and that he destroyed books of accounts or records from which such financial condition might be ascertained. The uncontradicted evidence is that no books or records were destroyed, but that all books and records were delivered by the bankrupt to the trustee in bankruptcy who had them prior to the war (R. 7), and that the trustee went away during the war and upon his return thereafter that the books and records could not be found. In the ear-

lier proceeding there was testimony of many witnesses heard by a master who died before he made any findings or recommendations (R. 22). A new referee in bankruptcy, without having been specifically designated as master in such proceeding, who had never heard the witnesses testify, and had never seen the books and records, made a recommendation that the discharge be denied, based on an unsigned memorandum of the deceased master (R. 32), which that master had exhibited to attorneys for petitioner as a tentative recommendation, but which he later agreed would not be made until a further hearing (R. 22). Meanwhile several years passed, after the hearing before the deceased master in February, 1917, without any activity on the part of any party in interest in opposition to discharge. The only objecting creditors, two in number, had withdrawn from the field of opposition, one an individual having died, and the other a corporation having been dissolved (R. 23), and no action had been taken by them or any other party in interest for more than six years. During the entire time, the bankrupt did nothing to delay or postpone a hearing (R. 23). The absence of opposition continued from February, 1917 until June 9, 1923, when the court on its own motion called the matter for consideration without appearance by any objecting party in interest and entered an order denying the discharge solely on the ground of laches. Such facts show, we submit, that all opposition to the discharge in the long pending proceedings had been abandoned long prior to 1923, and that, at that time, the record was the same as if no objection had ever been made; that the loss of the books and records which constituted the best evidence on the issue raised in 1917, together with the death of the master who had seen the witnesses on the stand, made it unfair and unjust to deny the discharge in

1923 when all opposition had disappeared; and that the laches of the bankrupt which was the sole ground for action by the district judge, did not exist in fact, the delays having been occasioned exclusively by the want of prosecution of the objections by the parties having the burden of proceeding on that issue.

We submit that the district court, if it had within its discretion the right to look to such other proceeding and to deny a discharge herein because of its status, should not have exercised the discretion and that this court, having whatever of discretion the district court possessed, should refuse to affirm the unjust order resulting.

POINT THREE.

Since a district judge, in passing on an application for discharge may not go beyond the record in the case before him, "investigate the merits of the application" on his own initiative, and deny the application from conclusions so reached, and since the denial of the discharge in the present case was not based upon any investigation of the merits, the affirmance of this case by the circuit court of appeals was erroneous.

Our entire argument under the first point is addressed to the proposition that the district court was obligated by the terms of the act, to grant the discharge to petitioner as prayed for, in the absence of opposition. All the authorities and arguments there presented support the proposition that the district judge may not "investigate the merits of the application" by going beyond the record in the case before him. The mandate to the district judge contained in section 14-b that he shall investigate the merits of the application is clearly limited by its context, the district judge being directed to investigate only the record of the case

before him, and not to go beyond such record to indulge in a personal investigation which, of its nature, could not be made a part of the record and which would or might descend to the level of inquisition or of caprice. The wealth of authority in point which we have heretofore discussed, demonstrates beyond question that this was not the intent of Congress in its use of the terms "investigate the merits." As Mr. Justice Brandeis has recently said:

> "It is not lightly to be assumed that Congress intended to depart from a long established policy." **Robertson v. Railroad Labor Board,** 267 U. S. ....., 45 S. Ct., 621, 624.

In only one reported case other than the present, has the phrase in the statute been construed to grant to a district judge the right to make a personal investigation, outside of the record, of the merits of the application. Judge Lowell, sitting in the District Court of Massachusetts, held that there was no merit in the application for a discharge, **In re Marshall Paper Co.,** 95 Fed. 419, basing his refusal on a ground not specified by creditors, saying:

> "It should be observed, however, that under the existing bankruptcy act, the duties of the judge regarding discharge, are more onerous than those imposed by the act of 1867. He is directed to 'investigate the merits of the application' and hence is not confined to the consideration of those objections to the discharge which are properly set forth by creditors." 95 Fed. 419, 422.

The first circuit court of appeals, after carefully considering the purpose and effect of the clause in the statute relied upon by the district judge, unanimously reversed this case. After quoting section 14-b of the bankruptcy act and stating that the bankrupt is entitled to his

discharge as a matter of right, provided he has not committed one of the offenses enumerated, the court said:

> "By this provision, the judge shall hear the application and discharge the applicant unless he is found guilty of some one of the prescribed offenses. The court is not authorized to deny the application for discharge upon a ground not set forth in this section. In re Black (D. C.), 97 Fed. 493. A refusal to grant a discharge cannot be said to rest in the discretion of the judge. The words, 'investigate the merits of the application,' must be taken in connection with the context. To construe these words as if they stood alone and disconnected from what follows would be to leave the whole question of discharge in the discretion of the court. Looking at the entire section, we do not think these words will bear such a construction, however desirable it may seem to the court in a particular case to so interpret them. It seems to us that Congress in this section clearly specifies the only causes for which a discharge can be denied, and leaves to the court the sole duty of deciding, after due hearing, whether such cause exists.
>
> "When the bankrupt files his petition for a discharge, the only facts pleadable in opposition thereto are those which show that, under the provisions of section 14, he is not entitled to a discharge. In other words, it must be shown that he has committed some one of the offenses described; otherwise the judge 'shall' discharge the applicant." **In re Marshall Paper Co.**, 102 Fed.872, 874.

This decision has been cited with approval in many subsequent cases, though in none of them does the question now under discussion appear to have been raised.

Were a personal investigation by the district judge permissible, however, the present case may not be affirmed on such basis, for it is shown by the opinion filed by the district judge herein that his denial of the discharge in part, is based on the laches of petitioner in not obtaining a hear-

ing in another proceeding of his application for discharge therein pending. For the various reasons presented under our second point, such action by the district judge was erroneous. Under no possible conception can it be said that his action involved a personal investigation of the question whether petitioner was entitled as a matter of morals, or of justice, to his discharge.

Nor is there involved in the present proceeding, as the opinion of the circuit court of appeals indicates, any abuse of the process of the courts. There is, in substance, the same sort of controversy here involved as there would be if Atkins were prosecuting a suit against Freshman on his debt. The question in this and in the hypothetical case is, whether the debt of Freshman to Atkins is and shall remain a subsisting obligation. The court is not a guardian or trustee for either of the parties in either case. Atkins, let us assume, filed suit, and upon a trial, after due hearing, it was finally determined that he should take nothing. If thereafter Atkins should bring a second suit on the same indebtedness, it would be the duty of the court clearly, if Freshman did not plead *res judicata*, and was in default, to render judgment for Atkins on the same claim which had been previously determined to be unfounded. In the hypothetical case, the duty was upon Freshman to plead his defense of *res judicata*, or otherwise to avoid default in the second suit. If, by assuming the hazard of court costs and expenses in the second suit, Atkins should thus obtain a judgment by default, the judgment would nevertheless be valid. Courts have uniformly so decided. *Res judicata* must be pleaded and proved. With even greater reason, the courts have also decided uniformly that the defense of a suit pending must be pleaded and proved, or else is waived.

Of course if there is a multiplicity of litigation, either instituted or threatened, equity may in proper circumstance intervene with an injunction. An injunction properly applied for in bankruptcy proceedings should protect parties in interest against any injustice which, in the opinion of the circuit court of appeals, would seem to follow from an affirmance of the present case.

The parties to the present proceeding, as to all other litigation, should be left on their own resources to protect themselves by the remedies which are afforded them at law and in equity, without the intervention on their behalf of courts; for an intervening judge raising issues not raised by the parties themselves, is a partisan and not a court. Every possible issue as to a discharge, as all other litigation, is dependent upon the existence of adversary parties.

CONCLUSION.

In the premises, petitioner submits that the orders herein of the district court and of the circuit court of appeals are erroneous and should be reversed, and prays that by order of this court all such orders be reversed and this case remanded with appropriate instructions.

JOSEPH MANSON McCORMICK,
PAUL CARRINGTON,
Attorneys for Petitioner.

Dallas, Texas,
September 10, 1925.

SUPREME COURT OF THE UNITED STATES.

No. 41.—October Term, 1925.

Samuel Freshman, Petitioner, *vs.* W. S. Atkins. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 16, 1925.]

Mr. Justice Sutherland delivered the opinion of the Court.

On November 1, 1915, the petitioner filed in the federal district court for the northern district of Texas a voluntary petition in bankruptcy. Within the statutory time he applied for his discharge, which was contested. The referee, to whom it had been referred as special master, having died after a hearing, his successor as referee reviewed the record and recommended that the discharge be denied. The referee's report was filed with the clerk, but not acted upon by the court, nor was the matter ever brought to the court's attention by the petitioner or any other interested party. On November 11, 1922, a second voluntary petition was filed by the bankrupt. The creditors listed in the first petition were, together with others, included in the second. In February, 1923, the petitioner filed an application for a discharge under the second proceeding. The referee recommended that the discharge be granted. The court, upon its own initiative, took judicial notice of the pendency of the former application and denied the second, in respect of the creditors included in the first petition; granted it as to the additional creditors; and, upon an inspection of the record, denied, by a separate order, the discharge sought under the original proceeding. 290 Fed. 609. The order denying in part the second application was affirmed on appeal by the circuit court of appeals. 294 Fed. 867. A motion was made in the district court for a rehearing of the question of discharge under the original proceeding, but what, if any, action has been taken respecting it, does not appear.

The opinions of the two courts do not proceed upon precisely similar grounds, but they reach the same conclusion, which is, in

effect, that the pendency of the first application precluded a consideration of the second in respect of the same debts. In this conclusion we concur. A proceeding in bankruptcy has for one of its objects the discharge of the bankrupt from his debts. In voluntary proceedings, as both of these were, that is the primary object. Denial of a discharge from the debts provable, or failure to apply for it within the statutory time, bars an application under a second proceeding for discharge from the same debts. *Kuntz* v. *Young*, 131 Fed. 719; *In re Bacon*, 193 Fed. 34; *In re Fiegenbaum*, 121 Fed. 69; *In re Springer*, 199 Fed. 294; *In re Loughran*, 218 Fed. 619; *In re Cooper*, 236 Fed. 298; *In re Warnock*, 239 Fed. 779; *Armstrong* v. *Norris*, 247 Fed. 253; *In re Schwartz*, 248 Fed. 841; *Horner* v. *Hamner*, 249 Fed. 134; *Monk* v. *Horn*, 262 Fed. 121. A proceeding in bankruptcy has the characteristics of a suit, and since the denial of a discharge, or failure to apply for it, in a former proceeding is available as a bar, by analogy the pendency of a prior application for discharge is available in abatement as in the nature of a prior suit pending, in accordance with the general rule that the law will not tolerate two suits at the same time for the same cause?

Here there was no plea or objection by any interested party, and it is argued that this is a necessary prerequisite to a consideration of the matter—that the court may not refuse a discharge *ex mero motu*. That such is the rule where the action of the court is based upon one or more of the acts of the bankrupt which operate to preclude a discharge may be conceded. But the objection that the issue is already pending, as that it has been adjudged, goes to the right of the bankrupt to maintain the later application, not to the question of the evidence or grounds upon which the relief may be granted if the application be maintainable. The refusal to discharge was not on the merits but upon the procedural ground that the matter could not properly be considered or adjudged except upon the prior application. This application had been reported upon adversely by the referee, was still pending, and, in ordinary course, could have been considered and acted upon by the court. To ignore it and make a second application, involving a new hearing, was an imposition upon and an abuse of the process of the court, if not a clear effort to circumvent the statute by enlarging the statutory limitation of time within which an application for a discharge must be made. In such a situation the court may well act of its own motion to suppress an attempt to overreach the due and

orderly administration of justice. What is said in the *Fiegenbaum* case, *supra*, p. 70, is appropriate here: "Not only should the court of bankruptcy protect the creditors from an attempt to retry an issue already tried and determined between the same parties, but the court, for its own protection, should arrest, in limine, so flagrant an attempt to circumvent its decrees." There is nothing in *Bluthenthal* v. *Jones*, 208 U. S. 64, to the contrary. There the previous denial of a discharge had been in another court sitting in another state. This court held that, while an adjudication in bankruptcy, refusing a discharge, came within the rule of *res judicata*, the court in which the second proceeding was brought was not bound to search the records of *other* courts and give effect to their judgments. This is far from saying that the court may not take judicial notice of, and give effect to, its own records in another but interrelated proceeding, as this was. See *In re Loughran*, *supra*, p. 621; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217; *Dimmick* v. *Tompkins*, 194 U. S. 540, 548; *Louisville Trust Co.* v. *Cincinnati*, 76 Fed. 296, 318; *In re Sussman*, 190 Fed. 111, 112.

The order of the district court denying the first application is not before us for consideration. If erroneous, relief may be afforded by proper and timely application to that court or by an appellate review of the order.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.